(30,515)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924

No. 550

DE WITT T. LAW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 16, 1924

[fol. 1] CAPTION—Omitted

[fol. 2] IN UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA

DE WITT T. LAW, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed March 21, 1922

The plaintiff for cause of action petitions and alleges:

1

That the plaintiff is a citizen of the United States and of the State of Montana, residing in Missoula, Missoula County, Montana.

2

That on the second day of June, 1917, plaintiff enlisted in the United States Army and served therein in the war against Germany until the 10th day of February, 1919, when he was honorably discharged therefrom, as a patient of Walter Reed, General Hospital, Tacoma Park, Washington, D. C., on account of disabilities incurred in such military service, hereafter described.

3

That during the time of his said enlistment and pursuant to the terms of the act of Congress of October 6, 1917, relating to War Risk Insurance, the plaintiff applied for insurance against death, and permanent and total disability, and was issued or should have been issued a policy in the amount of $10,000 in accordance with the [fol. 3] application and contract form hereto attached, marked Exhibit "A" and made a part of this complaint as completely as though set out herein.

4

That on the 28th day of September, 1918, the aforesaid contract being then in full force, the plaintiff was advancing with his regiment in the Meuse Argonne offensive when he was wounded by an explosive shell, thereby sustaining an injury which necessitated the shoulder amputation of his left arm.

5

That in addition to the injury above stated a fragment from said explosive shell deeply penetrated plaintiff's left thigh, whereby he sustained an injury causing a permanent partial incapacitation of his left leg.

6

That in addition to the injuries before stated the plaintiff while in the army was subjected to long marches under weighty packs which owing to their constant strain caused a weakening and giving away of the arches of his feet.

7

That at the time of receiving the wounds described in paragraphs 4 and 5 plaintiff was made helpless thereby and was compelled to lie on the field of action for a period of 26 hours, after which time plaintiff was compelled to wait for a period of 48 hours during the time required to convey him to hospital before he could receive [fol. 4] medical attention, during all of which time plaintiff suffered great and excruciating pain and endured indescribable mental suffering both from the wounds received and the scenes which the plaintiff in his weakened condition was compelled to witness, by reason of which plaintiff contracted a nervous infirmity and that by reason of the premises plaintiff's said injuries have totally and will permanently incapacitate the plaintiff from performing any kind of useful work or labor.

8

That the plaintiff at the time of entering the service was a manual laborer engaged principally in farm work and was unfitted to perform or engage in any work other than manual labor.

9

That during all of the time of the life of said policy of insurance the plaintiff paid promptly premiums on said policy, the same being deducted from his pay in the United States Army, and plaintiff duly performed all of the conditions of said contract of insurance on his part to be performed.

10

That plaintiff has requested and demanded from the proper board that payment be made to him as provided in said policy on account of his permanent and total disability, but the said board has refused to allow the claim for such disability and by letter hereto attached, marked Exhibit "B" and made a part of this complaint, and by subsequent communications have denied all liability under said contract of insurance, and that by reason of the refusal of the said [fol. 5] board to recognize the plaintiff's claim there exists a disagreement between the plaintiff and the Bureau of War Risk Insurance as to plaintiff's claim under the said contract.

11

That under the terms and conditions of said contract of insurance as authorized by the aforesaid Act of Congress of October 6th, 1917, plaintiff is and since the 28th day of September, 1918, has been

entitled to monthly installments of $57.50 each and there is now due him an aggregate sum of $2,357.50 on account of his permanent and total disability pursuant to the terms of said insurance policy.

12

That the plaintiff has paid an excess sum of $33 in premiums on said policy the same being deducted from his pay in the United States Army after his injury occurred which said sum is now due him under the terms of the aforesaid contract of insurance.

13

That plaintiff's permanent and total disability entitles him to 199 additional monthly installments of $57.50 each to be paid him during his lifetime or in event of death to his beneficiaries M. A. Law and Jennie L. Law now living in Emmetsburg, Iowa, or to such other beneficiaries (subject to the regulations of the War Risk Bureau) as may be designated during the life of the plaintiff, and to such other monthly installments as may accrue to the plaintiff during his lifetime, all of which is pursuant to the aforesaid policy and [fol. 6] Act of Congress and such regulations as are authorized thereunder.

14

That said Bureau of War Risk Insurance and the United States have failed and refused to make any payments under the aforesaid contract.

Wherefore, plaintiff prays that he have judgment awarding him the sum of $2,390.50, together with costs, and that the said Bureau of War Risk insurance in the treasury department be decreed to pay such monthly installments as may accrue to him or to his beneficiaries and that plaintiff be given judgment for such further relief as may be due him.

(Signed) De Witt T. Law.

Jurat showing the foregoing was duly sworn to by De Witt T. Law omitted in printing.

[fol. 7] EXHIBIT "B" TO PETITION

Treasury Department, Washington, Bureau of War Risk Insurance

April 25, 1919.

Mr. De Witt Law, Tyler Star Route, Roundup, Montana:

In re C—137959

Acknowledgement is hereby made of receipt of your communication of recent date in which you state that you desire to make claim

for insurance on account of your disability, and beg to inform you that you are now receiving the maximum amount allowed for compensation under the provisions of the Act of October 6, 1917, and the amendments thereto, in view of the fact that the injury received by you has been rated as temporary total and not total and permanent within the meaning of the aforesaid Act.

Government insurance, which is separate and distinct from compensation is payable only upon the death of the insured or upon his becoming totally and permanently disabled within the meaning of the term as used in the War Risk Insurance Act and regulations made thereunder. It is therefore necessary for men disabled in the service to continue the payment of the monthly premiums due on their incurance until they have been examined and pronounced [fol. 8] totally and permanently disabled by the Medical Department of the Bureau; otherwise the insurance may lapse for non-payment of premiums. Payment should be made by check, draft, or money order payable to the treasurer of the United States, and addressed to the Disbursing Clerk, Bureau of War Risk Insurance, Washington, D. C.

When communicating with this Bureau, kindly refer to File No. C—137959.

By authority of the director:

Joseph Connolly, Acting Chief Compensation and Claims.

Per C1.
CC/mer.
12.

EXHIBIT "A" TO PETITION

I, William C. De Lanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of Section 402 of an act "to amend 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby, on this 15th day of October, 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the Act:

1. Insurance will be issued for any of the following aggregate amounts upon any one life:

[fol. 9]

Amount	Converted into monthly installments of
$1,000	$5.75
1,500	8.63
2,000	11.50
2,500	14.38
3,000	17.25
3,500	20.13
4,000	23.00
4,500	25.88
5,000	28.75
5,500	31.63
6,000	34.50
6,500	37.38
7,000	40.25
7,500	43.13
8,000	46.00
8,500	48.88
9,000	51.75
9,500	54.63
10,000	57.50

[fol. 10] Which instalments will be payable during the total and permanent disability of the insured, or if death occur without such disability for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all including months of disability already paid for, in both cases except as otherwise provided.

2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates:

[fol. 11]

Age	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500	$4,000	$4,500	$5,000	$5,500
15....	.63	.95	$1.26	$1.58	$1.89	$2.21	$2.52	$2.84	$3.15	$3.47
16....	.63	.95	1.26	1.58	1.89	2.21	2.52	2.84	3.15	3.47
17....	.63	.95	1.26	1.58	1.89	2.21	2.52	2.84	3.15	3.47
18....	.64	.96	1.28	1.60	1.92	2.24	2.56	2.88	3.20	3.52
19....	.64	.96	1.28	1.60	1.92	2.24	2.56	2.88	3.20	3.52
20....	.64	.96	1.28	1.60	1.92	2.24	2.56	2.88	3.20	3.52
21....	.65	.98	1.30	1.63	1.95	2.28	2.60	2.93	3.25	3.58
22....	.65	.98	1.30	1.63	1.95	2.28	2.60	2.93	3.25	3.58
23....	.65	.98	1.30	1.63	1.95	2.28	2.60	2.93	3.25	3.58
24....	.66	.99	1.32	1.65	1.98	2.31	2.64	2.97	3.30	3.63
25....	.66	.99	1.32	1.65	1.98	2.31	2.64	2.97	3.30	3.63
26....	.67	1.01	1.34	1.68	2.01	2.35	2.68	3.02	3.35	3.69
27....	.67	1.01	1.34	1.68	2.01	2,35	2.68	3.02	3.35	3.69
28....	.68	1.02	1.36	1.70	2.04	2.38	2.72	3.06	3.40	3.74
29....	.69	1.04	1.38	1.73	2.07	2.42	2.76	3.11	3.45	3.80
30....	.69	1.04	1.38	1.73	2.07	2.42	2.76	3.11	3.45	3.80
31....	.70	1.05	1.40	1.75	2.10	2.45	2.80	3.15	3.50	3.85

[fol. 12]

32....	.71	1.07	1.42	1.78	2.13	2.49	2.84	3.20	3.55	3.91
33....	.72	1.08	1.44	1.80	2.16	2.52	2.88	3.24	3.60	3.96
34....	.73	1.10	1.46	1.83	2.19	2.56	2.92	3.29	3.65	4.02
35....	.74	1.11	1.48	1.85	2.22	2.59	2.96	3.33	3.70	4.07
36....	.75	1.13	1.50	1.88	2.25	2.63	3.00	3.38	3.75	4.13
37....	.76	1.14	1.52	1.90	2.28	2.66	3.04	3.42	3.80	4.18
38....	.77	1.16	1.54	1.93	2.31	2.70	3.08	3.47	3.85	4.24

39....	.79	1.19	1.58	1.98	2.37	2.77	3.16	3.56	3.95	4.35
40....	.81	1.22	1.62	2.03	2.43	2.84	3.24	3.65	4.05	4.46
41....	.82	1.23	1.64	2.05	2.46	2.87	3.28	3.69	4.10	4.51
42....	.84	1.26	1.68	2.10	2.52	2.94	3.36	3.78	4.20	4.62
43....	.87	1.31	1.74	2.18	2.61	3.05	3.48	3.92	4.35	4.79
44....	.89	1.34	1.78	2.23	2.67	3.12	3.56	4.01	4.45	4.90
45....	.92	1.38	1.84	2.30	2.76	3.22	3.68	4.14	4.60	5.06
46....	.95	1.43	1.90	2.35	2.85	3.33	3.80	4.28	4.75	5.23
47....	.99	1.49	1.98	2.48	2.97	3.47	3.96	4.46	4.95	5.45
48....	1.03	1.55	2.06	2.58	3.09	3.61	4.12	4.64	5.15	5.67
[fol. 13]										
49....	1.08	1.62	2.16	2.70	3.24	3.78	4.32	4.86	5.40	5.94
50....	1.14	1.71	2.28	2.85	3.42	3.99	4.56	5.13	5.70	6.27
51....	1.20	1.80	2.40	3.00	3.60	4.20	4.80	5.40	6.00	6.60
52....	1.27	1.91	2.54	3.18	3.81	4.45	5.08	5.72	6.35	6.99
53....	1.35	2.03	2.70	3.38	4.05	4.73	5.40	6.08	6.75	7.43
54....	1.44	2.16	2.88	3.60	4.32	5.04	5.76	6.48	7.20	7.92
55....	1.53	2.30	3.06	3.83	4.59	5.36	6.12	6.89	7.65	8.42
56....	1.64	2.46	3.28	4.10	4.92	5.74	6.56	7.38	8.20	9.02
57....	1.76	2.64	3.52	4.40	5.28	6.16	7.04	7.92	8.80	9.68
58....	1.90	2.85	3.80	4.75	5.70	6.65	7.60	8.55	9.50	10.45
59....	2.05	3.08	4.10	5.13	6.15	7.18	8.20	9.23	10.25	11.28
60....	2.21	3.35	4.42	5.53	6.63	7.74	8.84	9.95	11.05	12.16
61....	2.40	3.60	4.80	6.00	7.20	8.40	9.60	10.80	12.00	12.20
62....	2.60	3.90	5.20	6.50	7.80	9.10	10.40	11.70	13.00	14.30
63....	2.82	4.23	5.64	7.05	8.46	9.87	11.28	12.69	14.10	15.51
64....	3.07	4.61	6.14	7.68	9.21	10.75	12.28	13.82	15.35	16.89
65....	3.35	5.03	6.70	8.38	10.05	11.73	13.40	15.08	16.75	18.43

[fol. 14]

Age	$6,000	$6,500	$7,000	$7,500	$8,000	$8,500	$9,000	$9,500	$10,000
15	$3.78	$4.10	$4.41	$4.73	$5.04	$5.36	$5.67	$5.99	$6.30
16	3.78	4.10	4.41	4.73	5.04	5.36	5.67	5.99	6.30
17	3.78	4.10	4.41	4.73	5.04	5.36	5.67	5.99	6.30
18	3.84	4.16	4.48	4.80	5.12	5.44	5.76	6.08	6.40
19	3.84	4.16	4.48	4.80	5.12	5.44	5.76	6.08	6.40
20	3.84	4.16	4.48	4.80	5.12	5.44	5.76	6.08	6.40
21	3.90	4.23	4.55	4.88	5.20	5.53	5.85	6.18	6.50
22	3.90	4.23	4.55	4.88	5.20	5.53	5.85	6.18	6.50
23	3.90	4.23	4.55	4.88	5.20	5.53	5.85	6.18	6.50
24	3.96	4.29	4.62	4.95	5.28	5.61	5.94	6.27	6.60
25	3.96	4.29	4.62	4.95	5.28	5.61	5.94	6.27	6.60
26	4.02	4.36	4.69	5.03	5.36	5.70	6.03	6.37	6.70
27	4.02	4.36	4.69	5.03	5.36	5.70	6.03	6.37	6.70
28	4.08	4.42	4.76	5.10	5.44	5.78	6.12	6.46	6.80
29	4.14	4.49	4.83	5.18	5.52	5.87	6.21	6.56	6.90
30	4.14	4.49	4.83	5.18	5.52	5.87	6.21	6.56	6.90
31	4.20	4.55	4.90	5.25	5.60	5.95	6.30	6.65	7.00

[fol. 15]

32	4.26	4.62	4.97	5.33	5.68	6.04	6.39	6.75	7.10
33	4.32	4.68	5.04	5.40	5.76	6.12	6.48	6.84	7.20
34	4.38	4.75	5.11	5.48	5.84	6.21	6.57	6.94	7.30
35	4.44	4.81	5.18	5.55	5.92	6.29	6.66	7.03	7.40
36	4.50	4.88	5.25	5.63	6.00	6.38	6.75	7.13	7.50
37	4.56	4.94	5.32	5.70	6.08	6.46	6.84	7.22	7.50
38	4.62	5.01	5.39	5.78	6.16	6.55	6.93	7.32	7.70

39.....	4.74	5.14	5.53	5.93	6.32	6.72	7.11	7.51	7.90
40.....	4.86	5.27	5.67	6.08	6.48	6.89	7.29	7.70	8.10
41.....	4.92	5.33	5.74	6.15	6.56	6.97	7.38	7.79	8.20
42.....	5.04	5.46	5.88	6.30	6.72	7.14	7.56	7.98	8.40
43.....	5.22	5.66	6.09	6.53	6.96	7.40	7.83	8.27	8.70
44.....	5.34	5.79	6.23	6.68	7.12	7.57	8.01	8.46	8.90
45.....	5.52	5.98	6.44	6.90	7.36	7.82	8.28	8.74	9.20
46.....	5.70	6.18	6.65	7.13	7.60	8.08	8.55	9.03	9.50
47.....	5.94	6.44	6.93	7.43	7.92	8.42	8.91	9.41	9.90
48.....	6.18	6.70	7.21	7.73	8.24	8.76	9.27	9.79	10.30
[fol. 16]									
49.....	6.48	7.02	7.56	8.10	8.64	9.18	9.72	10.26	10.80
50.....	6.84	7.41	7.98	8.55	9.12	9.69	10.26	10.83	11.40
51.....	7.20	7.80	8.40	9.00	9.60	10.20	10.80	11.40	12.00
52.....	7.62	8.26	8.89	9.53	10.16	10.80	11.43	12.07	12.70
53.....	8.10	8.78	9.45	10.13	10.80	11.48	12.15	12.83	13.50
54.....	8.64	9.36	10.08	10.80	11.52	12.24	12.96	13.68	14.40
55.....	9.18	9.95	10.71	11.48	12.24	13.01	13.77	14.54	15.30
56.....	9.84	10.66	11.48	12.30	13.12	13.94	14.76	15.58	16.40
57.....	10.56	11.44	12.32	13.20	14.08	14.96	15.84	16.72	17.60
58.....	11.40	12.35	13.30	14.25	15.20	16.15	17.10	18.05	19.00
59.....	12.30	13.33	14.35	15.38	16.40	17.43	18.45	19.48	20.50
60.....	13.26	14.37	15.47	16.58	17.68	18.79	19.89	21.00	22.10
61.....	14.40	15.60	16.80	18.00	19.20	20.40	21.60	22.80	24.00
62.....	15.60	16.90	18.20	19.50	20.80	22.10	23.40	24.70	26.00
63.....	16.92	18.33	19.74	21.15	22.56	23.97	25.38	26.79	28.20
64.....	18.42	19.96	21.49	23.03	24.56	26.10	27.63	29.17	30.70
65.....	20.10	21.78	23.45	25.13	26.80	28.48	30.15	31.83	33.50

[fol. 17] Rates at ages higher or lower will be given on request.

The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be concerted into a form selected before the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at net rates computed by the bureau, according to the American Experience Table of Mortality and interest at 3½ per cent per annum.

3. That the insurance has been granted will be evidenced by a policy or policies issued by the Bureau, which shall be in the following general form (which may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(Form of Policy for $5,000)

Military and Naval Insurance Policy

No. 1

Amount, $5,000. Age, 25. Monthly Instalments, $28.75.

The United States of America

Treasury Department, Bureau of War Risk Insurance

Under the authority granted by Congress in an act amending "An Act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved Sep-[fol. 18] tember 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:

Hereby insures from and after the — day of ——, 19—, John Doe, of Illinois, private, Company A, Third Infantry (Name, State of residence, and designation of the insured), conditioned upon the payment of premiums as herein provided, for the principal amount of $5,000, converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ per cent per annum) payable

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability; and

To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments have been paid for total and permanent disability or, if any such installments have been paid, then for a number of months sufficient to make 240 in all:

[fol. 19] To Sarah Doe, Wife of the insured;

If no beneficiary within the permitted class be designated by the insured, either in the insured's lifetime or by his last will and testament, or if any above designated beneficiary is or becomes disqualified or does not survive the insured, the insurance (or if any above designated beneficiary shall survive the insured, but shall not receive all the installments, then the remaining installments) shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the insured's place of residence be entitled to his personal property in case of intestacy.

If the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against such disability.

This policy is not assignable, and payments thereunder to the insured or a beneficiary are not subject to claims of creditors of the insured or beneficiary.

The insured may at any time, subject to the regulations of the bureau, change the beneficiary or beneficiaries to any person or persons within the classes permitted by the act, without the consent of the beneficiary or beneficiaries.

Upon the written request of the insured, accompanied by this policy for indorsement, or after his/her death, upon request of a beneficiary at the time of making claim, the insurance payable to any beneficiary may be converted into installments of reduced amounts payable for 240 months certain and for as much longer as such [fol. 20] beneficiary shall survive, such installments to be computed in accordance with the American Experience Table of Mortality and 3½ per cent interest.

Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so, to be deducted, a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within thirty-one days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

If the age of the insured has been misstated, the amount of insurance shall be adjusted at the amount not in excess of $10,000, which the premium actually paid would purchase at the insured's attained age.

During the present war and for more than five years thereafter, or until the earlier conversion of this policy as hereinafter provided, the monthly premium shall be in accordance with the following

[fol. 21] table of rates, increasing at each anniversary of the policy to the rate of his/her then attained age:

Table of Premiums for $5,000

(Ages 15 to 65)

Attained age	Monthly rate	Attained age	Monthly rate
15	$3.15	41	$4.10
16	3.15	42	4.20
17	3.15	43	4.35
18	3.20	44	4.45
19	3.20	45	4.60
20	3.20	46	4.75
21	3.25	47	4.90
22	3.25	48	5.15
23	3.25	49	5.40
24	3.30	50	5.70
25	3.30	51	6.00
26	3.35	52	6.35
27	3.35	53	6.75
28	3.40	54	7.20
29	3.45	55	7.65
30	3.45	56	8.20
31	3.50	57	8.80
32	3.55	58	9.50
33	3.60	59	10.25
34	3.65	60	11.05
35	3.70	61	12.00
36	3.75	62	13.00
37	3.80	63	14.10
38	3.85	64	15.35
[fol. 22]			
39	3.95	65	16.75
40	4.05		

Not later than five years after the war this policy, if written request be made to the bureau therefor, accompanied by this policy, will be converted without medical examination into any form of insurance selected from among those that may be prescribed by regulations of the bureau. Such converted insurance will be at net premiums, computed in accordance with the American Experience Table of Mortality and 3½ per cent interest per annum and will provide for cash, loan, paid-up and extended insurance values.

Wherefore the United States of America has caused this policy to be signed by the Secretary of the Treasury and by William C. De Lancy, the Director of the Bureau of War Risk Insurance, and countersigned by the registrar or an assistant registrar of the bureau.

W. G. McAdoo, Secretary of Treasury. William C. De Lanoy, Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C., this — day of ——, 19—.
—— ——, Registrar.

4. Persons entitled to apply for this insurance are:
[fol. 23] (1) A commissioned officer (including a warrant officer) in active service in the military or naval forces of the United States.

(2) Any person, male or female, enlisted, enrolled or drafted into active service in the military or naval forces of the United States, including non-commissioned and petty officers and members of training camps authorized by law.
The term "military or naval forces" means the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and any other branch of the United States service while serving pursuant to law with the army or the navy.

(3) Any member of the Army Nurse Corps (Female) or of the Navy Nurse Crops (female) while employed in active service under the War Department or Navy Department, respectively.

5. Insurance may be applied for in favor of one or more of the following persons with sum of $500 or a multiple thereof for each beneficiary, the aggregate not exceeding the limit of $10,000 and not less than $1,000 upon any one life:
Husband or wife.
Child, including legitimate child; child legally adopted before April 6, 1917, or more than six months before enlistment or entrance into or employment in active service, whichever date is the later; stepchild, if a member of the insured's household; illegitimate child, but, if the insured is his father, only if acknowledged by instrument in writing signed by him, or if he has been judicially [fol. 24] ordered or decreed to contribute to such child's support, and if such child, if born after December 31, 1917, shall have been born in the United States or in its insular possessions.
Grandchild, meaning a child, as above defined, of a child, as above defined.
Parent, including father, mother, grandfather, grandmother, stepfather and stepmother either of the insured or of his/her spouce.
Brother or sister, including of the half blood as well as of the whole blood, stepbrothers and stepsisters and brothers and sisters through adoption.
Unless other designation is made by the insured, such person or persons, within the permitted class of beneficiaries, as would under the laws of the place of residence of the insured be entitled to his personal property in case of intestacy shall be deemed designated as the beneficiary or beneficiaries to whom shall be paid any installments remaining unpaid upon the death, or disqualification under the provisions of the act of any named beneficiary.
6. In case the applicant does not desire the premium to be deducted from his/her pay (or his/her deposit) he/she should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his/her pay, or if such pay be insufficient, any balance from his/her deposit.

7. Applications for insurance are to be made upon the blanks provided by the bureau, but any writing sufficiently identifying the applicant and specifying the amount of insurance shall be deemed [fol. 25] sufficient. Upon request of the bureau, however, the applicant shall fill out and sign the proper blank as of the original date.

8. If a signed writing requesting insurance for less than $4,500 is mailed or delivered before the 12th day of February, 1918, to the Bureau of War Risk Insurance, Washington, D. C., or to any branch thereof or to any officer of the United States authorized to receive the same, such insurance, in the absence of other specification in such writing, shall be and be deemed applied for and the contract made on such 12th day of February, 1918, the provisions of Section 401 as to automatic insurance meanwhile continuing in full force; if so mailed or delivered on or after such day, or if for $4,500 or *or* more, though mailed or delivered before such day, the insurance shall, in the absence of other specification in such writing, be and be deemed applied for and the contract made on the day of mailing or delivery.

9. These terms and conditions are subject in all respects to the provisions of such act and of any amendments thereto and of all regulations thereunder now in force or hereafter adopted.

William C. De Lanoy, Director of the Bureau of War Risk Insurance.

Washington, D. C., October 15, 1917.

Treasury Department,

Bureau of War Risk Insurance,

Division of Military and Naval Insurance

Form 2

Application for Insurance

Home address: .....
(No. and street or rural route)

.....
(City, town or post office) (State)

Date of birth: .....
(Month) (Day) (Year) (Nearest birthday)

Present rank: .....Present station: .....Date of enlistment: .....
(Month) (Day) (Year)

I hereby apply for insurance in the sum of $.... payable to myself during permanent total disability and from and after my death to the following persons in the following amounts:

[fol. 27] Relationship	Name of beneficiary	Postoffice address: (a) No. and street or rural route; (b) city, town or postoffice and state	Amount of insurance for each beneficiary (in multiples of $500 only)
		(a)	.....
.....	.....(b)	.....	$.....
		(a)	.....
.....	.....(b)	.....	.....
		(a)	.....
.....	.....(b)	.....	.....
		(a)	.....
.....	.....(b)	.....	.....
		(a)	.....
.....	.....(b)	.....	.....

[fol. 28] In case any beneficiary die or become disqualified after becoming entitled to an instalment but before receiving all instalments, the remaining instalments are to be paid to such person or persons within the permitted class of beneficiaries as would under the laws of my place of residence be entitled to my personal property in case of intestacy.

I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

If this application is either for more than $4,000 insurance or is signed on or after February 12, 1918, I offer it and it is to be deemed made as of the date of signature.

If this application is for less than $4,500 insurance and in favor of wife, child or widowed mother and is signed before February 12, 1918, I offer it and it is to be deemed made as February 12, 1918.

If this application is for less than $4,500 and in favor of some person or persons other than wife, child or widowed mother and is signed before February 12, 1918, I offer it and it is to be deemed made as of

(Date of Signature:) Strike out whichever is not wanted.
(February 12, 1918.)

NOTE.—If in the last paragraph, you strike out "Date of Signature" leaving "February 12, 1918," the law gives you $25 a month for life in case of permanent total disablement occurring prior to such date and the same monthly amount to your wife, child or [fol. 29] widowed mother, but nothing to anyone else in case of your death before such date, and the insurance for the designated beneficiary other than wife, child or widowed mother is effective only if you die on or before February 12, 1918.

If you strike out "February 12, 1918," leaving "Date of Signature," a smaller insurance both against death and disability takes effect at once, but is payable in case of death to the designated beneficiary.

Signed at —— the — day of ——, 191-.

(Sign here) —— ——.

Witnessed by

—— ——.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 30] SUMMONS AND SHERIFF'S RETURN—Filed March 27, 1922

The President of the United States of America to the above-named defendant, the United States of America, Greeting:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable Geo. M. Bourquin, Judge of the United States District Court, District of Montana, this 22d day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of our Independence the 146.

(Signed) C. R. Garlow, Clerk, by H. H. Walker, Deputy Clerk. (Seal.)

UNITED STATES MARSHAL'S OFFICE,
District of Montana, ss:

I hereby certify, that I received the within summons on the 27th [fol. 31] day of March, 1922, and personally served the same on the 27th day of March, 1922, on the United States of America, by delivery to, and leaving with Ronald Higgins, Assistant U. S. Attorney, said defendant named therein personally, at Great Falls, County of Cascade, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by —— ——, attached thereto.

Dated this 27th day of March, 1922.

(Signed) Joseph L. Asbridge, U. S. Marshal, by —— ——, Deputy.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Sept. 1, 1922

Comes now the defendant, the United States of America, and for answer to the complaint of plaintiff on file herein, admits, denies and alleges as follows:

I

Admits the allegations of paragraphs 1, 2, 3 and 4 of said complaint.

II

Admits that plaintiff was wounded by a fragment from an explosive shell which penetrated plaintiff's left thigh, but denies plaintiff sustained an injury therefrom causing a permanent partial incapacity of plaintiff's left leg, as alleged in paragraph 5 of said complaint, the defendant alleging the fact to be that said wound and leg have wholly healed without permanent partial incapacity or any incapacity at all to plaintiff in the use of said leg.

Further answering said complaint, defendant alleges:

I

That on or about March 10, 1919, plaintiff made claim on defendant for compensation on account of his said wounds and injuries in accordance with Article III of the War Risk Insurance Act, and on or about March 20, 1919, defendant granted to plaintiff the maximum amount of compensation authorized by law on account of his said injuries in the sum of thirty ($30.00) dollars per month, which said sum, by due authority of law, was later raised and paid the plaintiff in the sum of eighty ($80.00) dollars per month, and [fol. 33] which said last-named monthly payment of compensation continued in force until September 26, 1919.

II

That prior to the said 26th day of September, 1919, the plaintiff, in lieu of said monthly compensation, made application to defendant for, and defendant granted to plaintiff, under then existing law, vocational training as a student in the Law Department of the University of Montana, which said vocational training and the compensation and allowances therefor, as provided by law, plaintiff accepted, and thereupon and on said 26th day of September, 1919, said monthly compensation theretofore granted plaintiff by the defendant was discontinued. That following the discontinuance of the monthly compensation as aforesaid, and ever since the granting by defendant and the acceptance by plaintiff of said vocational training, the plaintiff has been, and is now, a student in the Law Department of the University of Montana.

III

That defendant, by reason of granting to plaintiff said vocational training and the compensation and allowances provided therefor by law, and the acceptance thereof by plaintiff, has fully complied with, met and performed all obligations of defendant to plaintiff under and by virtue of the said contract of insurance with the plaintiff.

IV

Defendant denies the allegations of plaintiff's complaint not herein specially admitted, denied or answered.

[fol. 34] For a further and separate defense to plaintiff's complaint, defendant alleges:

I

That plaintiff was duly discharged from service in the army of defendant on or about the 10th day of February, 1919.

II

That no premiums under said contract of insurance between defendant and plaintiff were paid by plaintiff to defendant subsequent to his said discharge, and by reason thereof the insurance of plaintiff, and said contract and policy of insurance, lapsed for nonpayment of the premiums thereon on March 31, 1919.

III

That the defendant has duly performed the condition of the contract sued on in this action on its part.

Wherefore, defendant prays for judgment in its favor and for the dismissal of the complaint herein, and for costs of suit.

(Signed) John L. Slattery, United States Attorney. (Signed) W. H. Meigs, Assistant United States Attorney.

Jurat showing the foregoing was duly sworn to by W. H. Meigs omitted in printing.

[fol. 35] [File endorsement omitted.]

In United States District Court

[Title omitted]

Reply—Filed Sept. 21, 1922

[fol. 36] Comes now the plaintiff, De Witt T. Law, and for reply to the answer of defendant on file herein, admits, denies and alleges as follows:

I

Replying to the first defense of defendant's answer, plaintiff admits that on or about the 10th day of March, A. D. 1919, plaintiff made claim on defendant for compensation, and was granted said compensation by due authority of law, and further admits that on September 26, A. D. 1919, plaintiff accepted vocational training in lieu of compensation as alleged in defendant's answer, but denies that

by reason of the granting of the said compensation and vocational training by the defendant and the acceptance thereof by the plaintiff, that defendant has met or performed any of the obligations to the plaintiff contracted for by virtue of the said contract of insurance.

II

Replying to defendant's further and separate defense plaintiff

1. Admits that no premiums under said contract of insurance were paid by plaintiff, subsequent to his discharge from the United States Army, but denies that the said contract of insurance ever lapsed because of the alleged nonpayment of premiums, or that there was ever any default in the payment of premiums on the said insurance policy, the plaintiff alleges that the contract was an undertaking on the part of the defendant to pay the insurance benefits in the event of the permanent and total disability or death of the insured, and further alleges that such disability was incurred on September 28th, [fol. 37] 1918, prior to the alleged lapse of the insurance contract because of the nonpayment of premiums, and that under the terms of the contract, there were no conditions on the plaintiff's part to be performed subsequent to the disability specified in the contract.

2. Denies that the defendant has performed the conditions of the contract sued on in this action.

Wherefore, having replied to defendant's answer, plaintiff prays for judgment as prayed for in the complaint herein.

(Signed) De Witt T. Law, Plaintiff in Person.

Jurat showing the foregoing was duly sworn to by De Witt Law omitted in printing.

STATE OF MONTANA,
County of Musselshell, ss:

De Witt T. Law, being first duly sworn, on his oath states that he is [fol. 38] the plaintiff named in the reply hereto attached, and served said reply on this 18th day of September, A. D. 1922, by depositing a true copy thereof in the United States Post Office at Roundup, Montana, in an envelope addressed to John L. Slattery, United States Attorney, at Helena, Montana, and who is attorney for defendant named in said hereto attached reply; that affiant at the present time resides at Roundup, Montana, and said John L. Slattery, United States Attorney, resides and has his office at Helena, Montana, and there is a regular United States mail between Roundup, Musselshell County, Montana, and Helena, in Lewis and Clark County, Montana, and postage was fully paid by United States postage stamps in full and sufficient amount attached to said envelope, which contained said copy served as aforesaid.

(Signed) De Witt T. Law.

Subscribed and sworn to before me this 18th day of September, A. D. 1922. (Signed) W. A. Pennington, Notary Public for the State of Montana, Residing at Roundup, Montana. My commission expires August 26, 1923. (Seal.)

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TRIAL WITHOUT JURY—Filed Oct. 23, 1922

Now comes the defendant, The United States of America, by Ronald Higgins, Assistant United States Attorney for the District of Montana, and respectfully shows the Court that this action is one triable by the Court without a jury in accordance with the provisions of the Tucker Act of 1887 (24 Stat. 506, etc.) and amendments thereto, Act of March 3, 1911, Chapter II, Section 24, Paragraph 20, U. S. Comp. Stat. 1916, sec. 991, authorizing suits to be brought against the United States for which reason this defendant moves the Court that a jury be not called to try this cause.

Cassarello vs. U. S. 265 Fed. 326.
Shepherdson vs. U. S. 271 Fed. 330.

(Signed) Roland Higgins, Assistant United States Attorney, District of Montana.

[File endorsement omitted.]

[fol. 40] DECISION ON MOTION FOR TRIAL WITHOUT JURY

No common-law right to sue sovereign, created by statute, the right is subject to statute's limitations. The War Insurance Act creates right to sue in this variety of cases, but does not prescribe procedure.

General and earlier statutes (Tucker Act, sec. 24, par. 20, Jud. Code), provide that suits in contract against the U. S. shall be tried to the Court. It is a rule of statutory construction that a law providing procedure for a genus of cases, opens to include any variety subsequently created of that genus, for which variety no other procedure has been provided. This trial is to the Court, not in admiralty. The physical examination moved for is denied as without the authority of the Court. Batsfed Case, 141 U. S.

The War Insurance Act provides that the party entitled to compensation shall submit to reasonable examination or be denied compensation. The Bureau thus has its remedy and the only one. It

does not, however, confer power on the Court to order such examination.

[fol. 41] October 25, 1922.

Bourquin, J.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR SPECIFIC FINDINGS OF FACT—Filed Oct. 26, 1922

Comes now the defendant, United States of America, and, deeming the following facts established by the evidence in this case, moves the Court to find said facts, and separately and specifically as hereinafter set forth:

I

That the plaintiff, DeWit T. Law, enlisted in the military service of the United States on June 2, 1917. (Service report, Defendant's Exhibit —.)

II

That plaintiff, DeWitt T. Law, applied for War Risk Insurance on [fol. 42] February 1, 1918, in the sum of Ten Thousand Dollars ($10,000.00). (Government's Exhibit —.)

III

That plaintiff, DeWitt T. Law, was discharged from the military service of the United States, at Walter Reed General Hospital, Washington, D. C., on a surgeon's certificate of disability on February 10, 1919, by reason of amputation, arm, left, upper third. Result of severe injury by shrapnel incurred while in action with A. E. F. near Verdun, France, September 28, 1918. Six tenths (0.6) disabled from earning subsistence. (Service record, Defendant's Exhibit —.)

IV

That subsequent to his discharge, on February 10, 1919, from the military service of the United States, plaintiff paid no premiums on his War Risk Insurance. (Admitted in replication.)

V

That on February 11, 1919, plaintiff was medically examined at the Bureau of War Risk Insurance, at Washington, D. C., and received a rating of temporary total disability, from said Bureau of War Risk Insurance, for convalescence, pending adjustment of his prosthesis for artificial arm. (Government Exhibit —.)

VI

That on March 8, 1919, plaintiff's specific disability was rated by said Bureau of War Risk Insurance, ninety per cent permanent, partial disability. (Government Exhibit —.)

[fol. 43]

VII

That said plaintiff, on October 31, 1921, was rated by the United States Veterans' Bureau, Washington, D. C., at eighty-five per cent, permanently, partially disabled, by reason of amputation of left arm, upper thigh and gunshot wounds, left thigh. (Government Exhibit —.)

VIII

That on or about August 8, 1919, plaintiff elected to receive from the Federal Board of Vocational Rehabilitation of the United States of America, a four-year course in law in the University of Montana, in consideration of the payments to be made to him, under said Vocational Rehabilitation Act, by said defendant. (Government Exhibit —. Testimony of plaintiff.)

IX

That on September 27, 1919, plaintiff matriculated at the said University of Montana, as a student in law, and is now, and has been continuously since said date, engaged in the occupation of a student at said university. (Plaintiff's replication, and testimony of plaintiff.)

X

That said plaintiff, while attending said University of Montana, as a student of law, was paid by said defendant Eighty Dollars ($80.00) per month, from September 27, 1917, to ——, 1920, and One Hundred Dollars ($100.00) per month to the filing of this suit, to wit, March 20, 1922, and that he is still being paid by said defendant the sum of One Hundred Dollars ($100.00) per month.

[fol. 44]

XI

That for about five months just prior to his enlistment in the military service of the United States, on June 2, 1917, said plaintiff was engaged in the occupation of a student in the Kansas State Normal School, at Emporia, Kansas.

XII

That said plaintiff is not now actually and in fact, permanently and totally disabled.

XIII

That said plaintiff never filed with the Bureau of War Risk Insurance, or the United States Veterans' Bureau, or either of them, a claim for any disability by reason of flat feet, or neurosis, prior to March 1, 1922. (Plaintiff's testimony and Government's Exhibit —.)

XIV.

That said plaintiff's claim for disabilities resulted from alleged flat feet and neurosis, filed on March 1, 1922, with the Sub-district office of the United States Veterans' Bureau, at Helena, Montana, was never adjudicated, or passed upon, by the United States Veterans' Bureau, or the Director of said Bureau prior to the filing of this action, to wit, March 20, 1922. (Government's Exhibit —, and plaintiff's testimony.)

XV

That no disagreement exists between this defendant and this plaintiff by reason of any decision of the United States Veterans' Bureau, or of its director, Charles R. Forbes, disallowing plaintiff's claim on account of alleged disabilities resulting from alleged flat [fol. 45] feet and neurosis, or either of them. (Plaintiff's testimony.)

(Signed) E. H. Horton, Associate Counsel United States Veterans' Bureau. Roland Higgins, Asst. United States Attorney, District of Montana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed Aug. 20, 1923

This action being at issue and having been brought on for trial before the Court, and the issue having been tried, and a general verdict for the plaintiff having been duly rendered on the 13th day of July, 1923,

[fol. 46] Now, on motion of De Witt T. Law, plaintiff, in person:

It is hereby adjudged that the plaintiff recover of said defendant Three Thousand Three Hundred and Thirty-Five ($3,335.00) Dollars, as found by the Court to be due said plaintiff.

(Signed) C. R. Garlow, Clerk, by H. H. Walker, Deputy.

Entered: Aug. 20, 1923.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions

Be it remembered that this cause came on regularly for trial on the 25th day of October, 1922, before the Honorable George M. Bourquin, Judge of the above-entitled court.

[fol. 47] The plaintiff, De Witt T. Law, appeared in propria persona, the defendant being represented by Ronald Higgins, Esquire, Assistant United States Attorney for the District of Montana, and by E. H. Horton, Esquire.

Whereupon the following proceedings were had and the following evidence submitted:

Defendant's motion for a trial without jury was granted by the Court.

Defendant moved the Court that plaintiff submit to a physical examination, which motion Court denied, defendant's exception being duly noted, and thereupon plaintiff offered to submit himself for a physical examination and by agreement the case was then continued to the following day to give defendant opportunity to make such physical examination.

On October 26, 1922, the trial of this case was resumed. Motion by plaintiff to amend paragraph 11 of petition to include all accrued payments to be due on day of judgment was granted. Exception by defendant.

Plaintiff offered in evidence a certificate of insurance marked "Plaintiff's Exhibit 1," which is in words and figures as follows, to wit:

[fol. 48] PLAINTIFF'S EXHIBIT No. 1

The United States of America

Treasury Department, Bureau of War Risk Insurance,
Washington, D. C.

Certificate No. 625,652

Date Insurance Effective: Feb. 1, 1918

This certifies that De Witt Thomas Law has applied for insurance in the amount of $10,000, payable in case of death or total permanent disability in monthly installments of $57.50.

Subject to the payment of the premiums required, this insurance is granted under the authority of an Act amending "An Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such Act, of any amend-

ments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.

W. G. McAdoo, Secretary of the Treasury. William C. De Lancy, Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C. C. E. Beard, Registrar. (Seal.)

[fol. 49] (On the back of said Exhibit 1:)

Important Notice

The insured may change the beneficiary without the consent of such beneficiary. This insurance is not assignable and is not subject to the claims of the creditors of the insured or of the beneficiaries.

Should a claim arise under this certificate you are requested to write direct to the Bureau of War Risk Insurance, Treasury Department, Washington, D. C., in order to secure a prompt settlement. There will be no expenses in connection with proving a claim and collecting the amount due, other than small fees to notaries. It will not be necessary to consult or employ an attorney, claim agent, or other person to secure benefits under this certificate.

Plaintiff offered in evidence his discharge marked "Plaintiff's Exhibit 2." The discharge, so received in evidence without objection as Plaintiff's Exhibit 2, is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT No. 2

Honorable Discharge from the United States Army

[SEAL]

To all whom it may concern:

[fol. 50] This is to certify That* De Witt Law† (#not known)

Private—Company "C" 137th Infantry the United States Army as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of‡ 3rd Ind. H. E. D. Gov. Isl. N. Y. Jan. 28, 1919, on S. C. D.

---

*Insert name, Christian name first; e. g., "John Doe."

†Insert Army serial number, grate, company and regiment or arm of corps or department: e. g., "1,620,302;" "Corporal, Company A, 1st Infantry;" "Sergeant, Quartermaster Corps;" Sergeant, First Class, Medical Department."

‡If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

Said De Witt Law was born in Pocahontas Co., in the State of Iowa.

When enlisted he was 23 10/12 years of age and by occupation a Farmer.

He had Blue eyes, Brown hair, Ruddy complexion and was 5 feet 5½ inches in height.

Given under my hand at Walter Reed Gen. Hosp. Takoma Park, D. C., this 10th day of February, one thousand nine hundred and nineteen.

G. S. Suneiner, Colonel Medical Corps, U. S. A., Commanding.

(Endorsements:) 55067. Indexed, Paged, Recorded, Compared.

STATE OF MONTANA,
Musselshell County, ss:

Filed for record this 7th day of April, 1919, at 11:40 A. M. and recorded in Book 57 of Misc. Records of Musselshell County, Montana, on page 451.

Volney J. Hain, Clerk and Recorder, by Norman M. Moody, Deputy.

$100. Sam Josephson.

[fol. 51] Washington, D. C. Apr. 22, 1919. Paid $60 under Act of Congress, approved February 24th, 1919. C. E. Gray, Major, Q. M. Corps.

Washington, D. C. Sep. 3, 1919. Paid —, travel pay under Act of Congress approved February 28, 1919.

(On the back of said discharge the following:) Entitled to travel pay to Burlington, Kans.

Enlistment Record

Name: De Witt Law (#no- known). Grade: Private.
Enlisted June 2, 1917, at Burlington, Kansas.
Serving in First enlistment period at date of discharge.
Prior service:* None.
Noncommissioned officer: Never.
Marksmanship, gunner qualification or rating:† No record.
Horsemanship: No record.
Battles, engagements, skirmishes, expeditions: American Expeditionary Force—France from about April 24, 1918, to about November 20, 1918.
Knowledge of any vocation: No record.
Wounds received in service: Amputation arm, left, upper third.
[fol. 52] Physical condition when discharged: Good (Except loss of limb).
Typhoid prophylaxis completed: No Record.

*Give company and regiment or corps or department, with inclusive dates of service in each enlistment.

†Give date of qualification or rating and number, date, and source of order announcing same.

Paratyphoid prophylaxis completed: No Record.
Married or single: Single.
Character: Excellent.
Remarks: No absences under Article of War #107.
Signature of soldier: De Witt Law.
A. H. Page, Lieut. Colonel, U. S. A., Retired, Commanding Det. of Patients.
(Endorsements:) Walter Reed General Hospital, Tacoma Park, D. C. Paid in full, $80.54. Wm. F. Rennie, 2d Lieut. Q. M. Corps. Transportation Issued.

TESTIMONY OF DR. JAMES D. HOBSON, FOR PLAINTIFF

Thereupon Dr. JAMES D. HOBSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Law:

My name is James D. Hobson. I am a physician practicing in Missoula. I am an ex-service man and was a first lieutenant in the medical department. I have been an examiner for the United States Public Health Service and generally for the United States Veterans' Bureau. I have charge of the men in attendance here in school and recognize you as one of those men.

Q. State whether or not you have ever given me a physical examination?

[fol. 53] By Mr. Higgins: Objected to, no foundation has been laid for this; disagreement has not yet been established.

By the Court: I suppose you have a clear idea of what you have to prove, and will prove it before you get through; the party will take his own order in submitting his proof.

Objection overruled. Exception noted.

A. I have, yes.

Q. And what injury did you find?

By Mr. Higgins: Objected to; it is indefinite and uncertain, and does not say when the examination was made.

By the Court: Ask him the time of year when this was.

A. I have made two examinations, one in December, 1919, and one in February, 1922.

By the Court: Very well, proceed.

By Mr. Higgins: We object to any testimony resulting from the examination on the last mentioned date testified to by the witness, for the reason that at that time there was no disagreement existing between the plaintiff and the defendant.

Objection overruled. Exception.

Q. What injuries did you note on your examination at the one you gave as February, 1922?

By Mr. Higgins: Objected to on the same grounds.
By the Court: You will have your objection to all this testimony, [fol. 54] and I don't want you to be continually standing up and interrupting the party putting in his proof. Proceed.

A. I found an amputation of the left arm, a gunshot wound of the left thigh, small wound of the right leg, a moderate degree of flat feet,—I believe I designated as second degree,—a mild condition of neurasthenia. The injury to the leg was a transverse wound just below the hip joint on the front part of the thigh which measures approximately 5½ inches long and about 3 or 4 inches wide, showing some loss of tissue. This is the left leg. He had a small wound of the right leg too. There was some loss of tissue and some injury to the superficial nerve. I believe this injury would render some incapacitation.
Q. Could you, basing your opinion on your experience with ex-service men, could you estimate what percentage of disability this,—you could give on this?

By Mr. Higgins: Objected to, the witness not having qualified to answer the question.

Objection overruled. Exception.

A. I have had no experience in giving ratings of more than ten per cent; I should rate this as slightly more than ten per cent. This is based on the wound on the left leg itself. The matter of flat foot is a matter of largely the symptoms which the person complains of, the amount of disability; I wouldn't be able to rate the amount of disability due to the flat foot; I don't know, I'm sure.
[fol. 55] By the Court: Describe it more fully, what you mean—what it is.
A. It is a breaking down of the arch of the foot, which causes various symptoms. I mean that the foot has a natural arch, and in a condition of flat foot this is broken down, due to a weakness of the ligaments and support of the arch of the foot. It is simply relaxation of the ligaments and such like. It breaks down the arch, the bones aren't broken, the arch is broken down somewhat, and that is a matter of degrees.
Q. Well, in your opinion, is the injury of the leg——

By Mr. Higgins: Objected to, the witness is not qualified, and we object also for the reason that this is a jurisdictional question, and that the Court has not yet got jurisdiction to hear the case.

Overruled. Exception.

A. There was some permanent injury to the left leg. I think there will always be some permanent disability—how much no one can say. I do not think the disabilities are of such a nature that they

would hinder the taking up of any occupation requiring you to be constantly on your feet. They would hinder only to a minor extent.

Cross-examination by Mr. Higgins:

Q. You received no instructions, did you, from any of the directors of the Department, United States Veterans' Bureau, to make this examination about which you have been testifying?

By Mr. Law: That is immaterial.

[fol. 56] By the Court: There is no claim that he has.

Objection sustained.

A. My present title is Medical Examiner, United States Veterans' Bureau, and I am serving under the rules of the department. My immediate superior, I believe, is Mr. C. L. Busha, the State Supervisor.

Q. And there is a limitation to your authority, is there not, under the rules of the department?

By Mr. Law: It is immaterial; this witness has simply testified as to the extent of my disability.

Objection sustained. Exception.

By Mr. Higgins: We want to show there was no complaint ever made.

By the Court: Proceed.

A. The examination of Mr. Law, in February of this year, was made at his request and not at the request of any officer of the United States Veterans' Bureau. I have seen Defendant's Exhibit "A" before. I caused that notation to be made on it. The examination was made February 14, 1922.

Q. And how soon after this examination was made and this report drawn, was it sent in to the Bureau?

By Mr. Law: Objected to; that is all immaterial as to when this report was made, and so forth.

By Mr. Higgins: The purpose is to show there was no disagreement, and to show, even assuming this had been sent in——

By the Court: Very well; you are anticipating the defense, and [fol. 57] since this witness has stated nothing in regard to this agreement it is improper cross-examination; the objection is sustained.

A. I made another examination of this defendant, at which time I do not believe he complained of flat feet and neurasthenia.

Q. And when was that examination made?

By Mr. Law: That is immaterial, your Honor, as to them—what I complained of at that time, and so forth.

By the Court: The objection is sustained. Exception.

Q. Did you, from examination, or from complaint by the plaintiff, ever hear and learn of a neurasthenia or flat feet, prior to the date of this examination?

By Mr. Law: Defendant's witness has testified as to the condition of my feet, and so forth, and it is immaterial whether or not he heard of this prior to the examination on which he bases his testimony.

Objection sustained. Exception.

By the Court: Do I understand, Doctor, your testimony on direct was the result of your examination in February, 1922?
A. That is the only examination, your Honor, that I have been asked about, so far, until just the last few minutes.

By the Court: Yes.
By Mr. Higgins: If it please the Court, we desire to offer in evidence Defendant's Exhibit "A."
[fol. 58] By Mr. Law: What is the purpose of offering this?
By Mr. Higgins: Well, that is what you have been examining the witness about—that is his report.
By the Court: No objection. It will be admitted.

Defendant's Exhibit "A," so received in evidence without objection, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT "A"

United States Veterans' Bureau, Medical Division

Form 2545

Report of Physical Examination

Instructions for Filling Out This Report (Numbers of Paragraphs Correspond to Questions in the Form)

1. Check letter (S., M., W., D.) showing martial state.

11. (b) In case of wounds, give location and size of scars and whether or not they are adherent and tender. Also, a description of the injury to the underlying structures, with the resulting deformity, disturbed function, and limitation of motion expressed in degrees. Similar notation must be made in case of arthritis.
(c) When the applicant complains of dyspnœa on exertion as a [fol 59] sequela of gassing, heart disease, or bronchial asthma, note his pulse and respiration before, just after, and two minutes after exercise, which should consist of hopping 25 times on each foot.
(d) In case of heart disease, give general appearance, location of apex beat, and time of occurrence, location, and direction of transmission of murmurs, and rate and rhythm of pulse.
(e) If the claimant is wearing glasses, record the vision as corrected thereby. It is not expected that the general examiner will at-

tempt to fit proper lenses. If impairment of vision or hearing is found, the case should be referred according to the District Supervisor's instructions.

(f) In disabilities of the nervous system, and in eye, ear, nose, and throat conditions, special reports are to be made by specialists, designated by the District Manager.

12. Use the nomenclature of the United States Public Health Service.

14. A claimant is considered to have a vocational handicap when his disability would constitute a handicap in his principal prewar occupation, such as to affect employ- ability or earning power. Men without a vocation, i. e., students, and those who have not worked at one occupation more than one year and are under 21 years of age, [fol. 60] should have their handicaps considered in light of the general labor market.

20. Training is feasible when the mental and physical conditions permit and when the suggested occupation is not incompatible with his disability.

Important—Do not show records to, nor discuss findings or compensation awards with claimant.

(Endorsements:) (Received Mar. 4, 1922, U. S. Veterans' Bureau Dist. #10. Received Mar. 1, 1922, U. S. Veterans' Bureau.)

C. No. 137959.
D. No. —.
Army Ser. Not known.
Place: Missoula, Montana.
Date: February 14, 1922.

1. Claimant's name: (Last) Law, (First) De Witt, (Middle) S.
2. Service, rank, organization; date of induction, and military discharge: Pvt. Co. C, 137th Inf. Enlisted, June 2, 1917. Discharged, February 10, 1919.
3. Present address: 521 Eddy Ave., Missoula, Montana.
4. Age: 28 7/12.
5. Color: White.
6. Principal prewar occupation: Farm Hand.
7. Medical and industrial history since military discharge: Any acute intercurrent illnesses? Treated by what physician? When? [fol. 61] In what hospitals? When? Where? Employed continuously? Where, when? Claimant states that he was well when he entered the Service by enlistment, June 2, 1917. Was wounded by H. E. fragments in left arm, and both legs, while in action in Argonne Forest, France, about September 28, 1918. Taken to F. H. where the wounds were dressed and then to Mobile Hospital #2 where the left arm was amputated in the middle of upper third. To following hospitals successively: B. H. #48; B. H. #8, B. H. 65; Walter Reed General Hospital. Was fitted with an artificial arm on

the day of discharge, February 10, 1919, which has proven satisfactory. Had much trouble with feet on long marches.

Since discharge: Has been a student under Vocational Board in law department, University of Montana since September, 1919.

8. Subjective symptoms: Absence of left arm. Nervousness. Fallen arches.

9. Physical findings: (Claimant must be stripped; for tuberculosis examination see page 4. If an X-ray examination has been made, give the date, place, and authorship of the radiogram.)

(No Page numbered nineteen.)

Nose and throat: Negative.

Teeth: Few suspicious gold caps.

Glands: Not enlarged.

[fol. 62] Heart: Rate 60. Blood pressure: 130–84. Rate after ex ercise: 100. In two minutes: 80.

Lungs: Negative.

Arm: Left is absent. Stump consists of 3½ inches of humerus covered by skin and a scar which is not tender or adherent. No painful nuromate. The muscles of the shoulder girdle, particularly the supra and infra spinatus are atrophied. The stump can be voluntarily moved in all directions.

Legs: Scar 5x1½ in. anterior surface, middle third, left thigh. There has evidently been considerable loss of tissue. Scar is not adherent or painful. Scar ½x½ in. anterior aspect of right thigh. Not adherent or painful.

Vision (Snellen chart): Uncorrected, R. 20/ L. 20/; corrected by claimant's glasses, R. 20/ L. 20/.

Hearing (spoken voice): R. /20, L. /20.

Feet: 2d degree flatfoot, bi-lateral.

General: Some tremor. No disturbance of reflexes. Seems easily excited.

10. Diagnosis: Prognosis: Generally favorable. G.S.W. arm, left (with amputation) (2040). G. S. W. legs, right and left (2067). Neurasthenia mild (845). Pes Planus, bi-lateral, (952).

[fol. 63] NOTE—This claimant requested this examination as he contemplates taking some action at law against the Government to recover Total Disability Insurance.

11. Is claimant able to resume his prewar occupation? No.

12. Is claimant bedridden? No. Able to travel? Yes. Unattended? Yes.

13. Do you advise hospital care? No. Will claimant accept hospital care?

14. Has claimant a vocational handicap? (See par. 14 "Instructions.") Major.

15. Is his physical and mental condition such that training is feasible? Yes.

Name: James D. Hobson, M. D. James D. Hobson.

Title: Medical Examiner.

Address: Missoula, Mont.

(Endorsed on this page: Reviewed Date 3/2/22. Sig. A. N. J. D.)

(The fourth and last page of this exhibit is entirely blank, i. e., not being filled in or endorsed in any way.)

A. I have seen Defendant's Exhibit "B" before, and signed it.
Q. And what is it?
A. It is a report of examination made by——

By Mr. Law: Object to this, it is improper cross-examination.
By the Court: He may ask him what it is, but that does not intro-
[fol. 64] duce it in evidence; that much will be permitted.

A. It is report of physical examination made on Dewitt Law November 29, 1919.

By Mr. Law: I object to that being introduced in evidence.
By Mr. Higgins: We haven't offered it yet.
By Mr. Law: Object to this cross-examination; there has been no evidence of examination on November 29th.

By the Court: It is merely preliminary.
A. This is a report made upon the first physical examination of this plaintiff.
Q. And where did you send this report after making it?

By Mr. Law: That has nothing to do with the issues.
Sustained. Exception.

Q. Now, Doctor, at the time of this examination, the report of which is dated November 29th, and which is marked Defendant's Exhibit "B," did you find any neurasthenia or flat feet?

By Mr. Law: Object to this for the same reason, it is——
By the Court: Sustained. I want to state to you that it will be necessary for you, before you get through, to show that this condition the doctor has testified to in February, 1922, was due to your war service, but the objection is sustained to the last question.
Exception.
[fol. 65] By Mr. Higgins: We offer this in evidence, Defendant's Exhibit "B."
By the Court: Any objection.
By Mr. Law: Well, this is the same testimony that has been ruled out on cross-examination.
By the Court: Well, I am asking you if you object?
By Mr. Law: I do.
By the Court: The objection is sustained.
By Mr. Higgins: At this time we make an offer of proof.
By the Court: No offer of proof on cross-examination; you offer your documents and ask your questions, and when they are ruled on, that ends it.

Redirect examination by Mr. Law:

At the time you appeared for examination, I did not have have a record of your being here at school or here in Missoula. At the

time I gave you the first examination I was then acting as United States physician, and you appeared before me as one of the men disabled in the service.

Q. And these injuries that you noted, were they sent in to the War Risk Bureau?

By Mr. Higgins: Object to the question as leading, incompetent, irrelevant and immaterial, no bearing on the issues.

Overruled.

A. A report of the examination was sent in. I recognized you as one of the men who were disabled in the service. I believe I have no record of you from the service except some correspondence [fol. 66] I had with Minneapolis concerning an artificial arm for you. I have nothing in my files.

Q. This is Defendant's Exhibit 2; now, you will find certain injuries noted on here, and state whether those coincide with the injuries that you found?

By the Court: Found when?

By Mr. Law: Well, at the time of the first examination.

By Mr. Higgins: It is indefinite,—I don't know which examination.

By the Court: Which examination have you reference to?

By Mr. Law: Well, at the time of the first examination.

A. I find it says: "Wounds received in service; Amputation arm, left, upper third." That is one of the injuries I found on your person on examination.

Recross-examination by Mr. Higgins:

Q. Now, Doctor Hobson, you were asked if you sent a report of your examination, as on November 29th, and you said that you did?

By Mr. Law: Which year is that?

By Mr. Higgins: 1919.

Q. Is that Defendant's Exhibit "B," the report that you sent in?

A. That is my signature, yes, sir.

By Mr. Higgins: We again offer Defendant's Exhibit "B" in evidence, having been brought out on redirect.

[fol. 67] By the Court: It will be admitted.

Defendant's Exhibit "B," so received in evidence at this time without objection, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT "B"

Treasury Department

[SEAL.]

United States Public Health Service, Office of Medical Officer in Charge

Report of Physical Examination

Date: November 29, 1919.
Place: Missoula, Montana.
Claimant's Name: Law, De Witt.
Claimant's Bureau War Risk Ins. Compensation No.: Not known
Service organization and rank: Pvt. C Co., 137th Inf.
Present Address: 519 E. Front St., Missoula, Mont.
Age: 26. Previous occupation: Farm Hand, Student.
Color: White. Suggested occupation: Law Student.

Military history of disability: Claimant states that he was well until he entered the service by enlistment June 2, 1917. At about 8:00 A. M. Sept. 28, 1918, while in action in the Argonne Forest he was wounded by H. E. fragments in the left arm, left and right leg. Was taken to a Field Hosp. where the wounds were dressed and then to Mobile Hosp. No. 2 where left arm was amputated in the [fol. 68] middle of upper third. Successively taken to B. H. 48, B. H. No. 8, and to B. H. 65. Embarked for U. S. on Nov. 11, 1918, and on arrival was sent to Walter Reed General Hosp., Tacoma Park, D. C. Wounds healed while there Jany. 1, 1919. Was fitted with an artificial arm on the day of discharge Feby. 10, 1919, which has proven satisfactory.

Present complaint: Absence of left arm, pain and stiffness in scar on left leg.

Physical examination: Arm: Left absent. Wears a well-fitted prosthesis which is functionless except for the sake of appearance. The stump has healed and *the* remains some function of the pectoral muscles. The stump is not painful. Legs: Scar 5 x 1½ in. anterior surface, middle third left thigh. There has evidently been considerable loss of tissue. The scar is not adherent or painful. Scar ½ x ½ in. anterior aspect of right thigh. This scar is not adherent or painful. Diagnosis: Avulsion of arm, left, with amputation (1660). Wound of leg, right and left, due to gunshot (2077). Prognosis: There should be no further trouble from the wounds.

Claimant is not able to resume former occupation except as student. I do not advise it. He is not bedridden and is able to travel. [fol. 69] No hospital care is necessary. Disability is traceable to service. Disability is over ten per cent (10%). The vocational handicap is major. He is now in vocational training as a law student at the State University of Montana. I have personally exam-

ined this man. He comes for examination because he was given on discharge a temporary, total disability and he feels is should be permanent.

Examined by Dr. James D. Hobson.

James D. Hobson. James D. Hobson, Examiner, U. S. P. H. S.

(Endorsed on back: Claims Compensation & Insurance Dec. 20, 1919.)

The disabilities discovered as set forth in the report designated Defendant's Exhibit "B" shows plaintiff's left arm is absent, wears well fitted prosthesis, which is functionless except for the sake of appearance. The stump is healed and there remains some function of the pectoral muscles. The stump is not painful. Legs: scar 5 x 1½ inch on the anterior surface, middle third, the left thigh. There has evidently been considerable loss of tissue. The scar is not adherent or painful. Scar ½ x ½ inch anterior aspect of right thigh. This scar is not adherent or painful. The prognosis made at that time was that there should be no further trouble from the wounds. That is my statement here. That is the only prognosis made in the report and there is nothing in it that states the plaintiff was suffering from neurasthenia or flat feet.

[fol. 70] Redirect examination by Mr. Law:

Q. At the time I appeared before you, Doctor, after you had,—you didn't give me a very thorough examination?

By Mr. Higgins: Object to the question as leading; the report of the examination speaks for itself.

By the Court: It is.

Q. Did you at that time, at the time of the examination referred to in that examination, give me a thorough examination?

By Mr. Higgins: Objected to, it is leading; further, the report shows what he has made, and speaks for itself.

By the Court: It is leading, but the question would be harmless.

Overruled.

By Mr. Higgins: We object on the further ground that there is in the report nothing concerning neurasthenia or flat feet and consequently there could be no disagreement on those grounds.

A. I made a though examination of the complaint made at that time.

Q. And was there a complaint made as to these,—as to the others.

By Mr. Higgins: Objected to as leading.

Overruled. Exception.

A. I think not.

[fol. 71] TESTIMONY OF DE WITT T. LAW, FOR PLAINTIFF

DE WITT A. LAW, the plantiff, was duly sworn and testified in his own behalf as follows:

Direct examination by Mr. Law:

My name is De Witt T. Law. I am the plaintiff in this case. I enlisted in the army at Burlington, Kansas, June 2, 1917,—called into service at Burlington, Kansas, had light training there for a few weeks, then went to Camp Doniphan, Oklahoma, and I trained there until about March 15th, I think, and then went to New York and embarked for France, and then I was in regular service in France. The nature of this training at Camp Doniphan was the regular daily course and the marksmanship practice, and a great deal of hiking. The hikes were more strenuous than the ordinary walks in civil life. They were made under forced orders and under heavy weight, and were often made over difficult territory, and long. They were continued in the form of marches. On these marches, I carried from sixty to one hundred and twenty rounds of ammunition, my gun and my pack, and all weighed probably from eighty to a hundred pounds, varying, of course, and also varying as to whether or not it was raining. These marches seemed most tiresome in the feet, that is, I mean by most tiresome, that I experienced most difficulty from my feet.

Q. Because of this service did you sustain any injuries to your feet?

A. Yes, I sustained flat feet and fallen arches.

[fol. 72] By Mr. Horton: Objected to, and move that the answer be stricken out as a conclusion of the witness.

Overruled. Exception.

The extent of the injury, and just the cause of the injury was not discovered until I came back from Washington,—to Washington,—and when,—after recovering from my other injuries, and going out on the pavements, my feet became very painful, and I reported to one of the attendants in the hospital, and spoke to him concerning my feet, and he noted the trouble, but stated that if I wanted to get out of the hospital that winter I had better not report it to the medical authorities. My feet, in walking, especially when walking on pavements, became painful, and the arches,—more noticeable in the left arch, the muscles become painful up to the back and calf of the leg. I have this trouble at the present time. The other injuries alleged in the complaint I sustained in battle in the Argonne, known as the Meuse-Argonne offensive.

I went,—was with my Division, the Infantry, 137th Infantry; we went only up to the line the evening of the 25th, about twelve o'clock that night until about three next morning, when we went out and took formation for advance; during that day I continued with the infantry, and,—with my infantry, which was at that time

the immediate reserve, and the night of the 27th we took the advance; the advance line fell back and we advanced forward, taking [fol. 73] the front the day of the 28th about 7:30 in the morning; we were starting in advance, we were thrown into charge formation,—that is, fine formation for advancing; we advanced to the ridge of a hill which slopes to the north and east and started over the hill in this formation and had went but a short ways, when the Germans,—or when the barrage laid down on us, and a good many men were killed and a great many others injured; I had nearly reached the bottom of the hill when I heard a shell come right to my left a few feet, and almost instantly the explosion came, and the explosion gave me a sudden jar, sent me forward, and scrambling for my feet; I recovered, and held my feet, and thought for a second that I wasn't hit, because it just badly shocked me, and then I noticed my arm, it was swinging and the muscle loose and the muscles were contracting and jerking violently; I got hold of my arm and turned around towards the balance of the formation of which I was a part, and in the scramble I had went forward, and came back and met them, and I told them,—told the corporal that they got my arm, and of course they were advancing, and did nothing but stared; I followed the charge until they came to a road which was an immediate objective, and we stopped at this road, and one of the boys took a tourniquet on my arm and stopped the blood; at this time I was bleeding badly and very weak; this was the 28th of September; I remained on this road until about ten o'clock the 29th; I was wounded about eight o'clock the 28th. [fol. 74] After my wound the blood was stopped, I was still in a conscious condition, and the,—of course my company went on, and I was weak and delirious, so that I could,—as soon as I attempted to get my feet, I would faint,—that is, I didn't lose consciousness, but I became blind, and would have to go down again, and I remained in this state during that day, about ten o'clock it began to rain, that day and that night; in the meantime other troops were advancing; I was at the front of the rear, and in full view of the troops as they came over and as they were taking the formation at the crest of the hill, coming down, and always meeting with the same reception, with a heavy barrage; the men were blown to pieces and knocked down, that is to say, in blown to pieces, I mean the columns were blown to pieces; and this continued intermittently throughout all the day, and the shelling would continue clear down to the road and the road was continually under shell fire. I was often, not often, but probably two or three times, while lying there, close enough to shells, so that the rocks and things blown out of the earth would come and settle around me; at night the fire along the rear ceased, and the men were no longer advancing, but as the range of the opposing guns seemed to have been raised, the shelling continued, but went back, and back into our reserve, but after that it became more noticeable as to the state of the men around me, and during the day a great many men had went down just as I had, and were lying there, and during that

[fol. 75] night the air was just a continual scream, men were delirious some of them, some of them dying and crying for help, and this continued all night; I was; I was carried from the road, I think, the report stated, at ten o'clock, the 29th of December,—or September,—and,—but I was then taken only about a quarter of a mile up from the ridge, that is, the crest of this hill, there was a small town, just a few buildings, as I remember it now, and I was taken and laid in here with several other men who were more or less injured, some of them in as bad shape as I was, and we laid here all day on the floor; they was able to get a few raincoats, and so forth, to put over me, but otherwise my condition from then, and being out in the rain, my condition was unsatisfactory, and I was still within the shell zone. About four o'clock, I think probably, as near as I can remember, they threw a gas barrage down over the hill, and I was unable to get my gas mask on and I breathed in some of the gas that made me deathly sick,—it wasn't the gas that affects your lungs, but it was poisonous gas that affects your system, and it started me to vomiting, and violently, and I was extremely sick from that, from then until the time I reached the hospital; just about dark that evening, there had been rumors coming of a counter attack, and the Germans continued the counter attack, but the rumors, as far as I was concerned, until this time, were unfounded, but at dark the,—I noticed that the men who were able to get out of that building were getting out, and I heard lots [fol. 76] of them hollering to "take me next outside," and "don't let them get me," and such expressions as that, and then I noticed the shelling from the machine gun fire came closer, and the German guns were, seemed to be the ones that were the most incessant, and that our lines was falling back, and that we were in danger of being taken into the German territory; I tried to holler for help, somebody to come and get me, but I wasn't able to make my voice heard, and in some way I got hold of the wall and drug myself along, got outside of the building, and as soon as I got out, why I tumbled over again, and one of the medical men who were there saw me and came down and took me out in the line-up, the fellows that were waiting to be carried back, they were rushing the men back as far as possible, and one of the lieutenants ordered me to walk, get back if I could. I attempted it, but was unable to go, and he ordered me to wait there, and I don't think I was there any great length of time until I was put on a stretcher again and carried back to a road, and this road took us in contact with the line of connection to the medical authorities, and they put me,—I was placed in an ambulance and was taken back to a small town slightly within range of the fighting zone,—that is, the guns by this time had come up to this point,—and as soon as I approached this town I complained of my arm, I thought it was swelling badly under the bandages, and they took me to a doctor, he took the bandages off and he bandaged the arm; at this time my arm was affected, of course, and I think the bones were shattered partly gone, and it [fol. 77] was blue; and this was the first medical care I had received,

except during the day of the 28th, some time during that day one of the field doctors came up and took the tourniquet off and bandaged the arm; and after this I was taken back into another room where a number of us were laid on the floor and we,—they tried to bring me something to eat but I was unable to eat any,—what they had was dry, starch food, and I had no moisture in my mouth to digest it, when I went to chew it would just simply gag me and I was unable to swallow. And I stayed here until the evening of the,—this was the evening of the 30th, about,—I stayed there until about, I think, about eight o'clock the evening of the 30th, when I was again put in an ambulance and pushed back a few miles to a field hospital; they first sent me to a gas ward,—here, that is at the field hospital, but I was very sick, and with my other injuries, and they sent me from the field hospital or from the gas ward into the officers' tent, and here my clothes were taken from me, and they built a fire, I think, under my feet, the way it felt, and gave me something to put me to sleep; this was the first time I had slept since the, since receiving my injuries, and in fact with the exception of about two hours the night of the 25th, and then about probably an hour or two the night of the 26th and about three hours the night of the 27th, was all the sleep that I had since the 25th of September, and this was October 1st I was taken from the field hospital [fol. 78] about ten o'clock or nine o'clock I would say, the 31st of October,—this hospital was,—seemed not to have been properly equipped to handle my case, and without proper medical attention, and they rushed me back to Mobile 2, where I was put under chloroform, and when I came out that evening, why, my arm was amputated.

I have a record of myself after receiving my injuries. It is correct except the date of this injury. This record notes me as injured September 27th, rather than September 28th. I can explain this error. At the time, the evening of the 29th, when I was carried back to the second buildings, which I referred to before, in the second town, they come asked me when I was injured, that is the time this field record was started, and I told them—I thought that it was morning,—it was really the night of the 29th, but I thought it was the morning of the 30th, from the longness of the hours, and so forth, and I said, "the injury happened day before yesterday," that would make it the 27th, but it was still the 29th, and the injury had happened yesterday, so that accounts for the error in the field record. I can gauge from my injuries how close I was to the explosive shells. One of the shells, in crossing my body, struck the left leg, the left thigh was raised, striking the other leg at about four inches raise, and this was, in taking the distance that would travel in getting there and getting the general raise of the shell, and taking the height where the wound struck, my left leg, why you [fol. 79] can ascertain,—take the distance, the raise of the shell in going the eight inches across the body into the four inches, into this, and that multiplied by the eighteen inches, and you will get approximately the distance that the piece that had crossed my body had traveled. I have measured this out; it had traveled about eleven

or twelve feet, I couldn't,—you can't get it exact, because it might make some difference as to the distance of my steps at that time.

Q. Did you sustain any injuries other than those particularly mentioned?

A. Yes.

By Mr. Horton: I have forgotten what other injuries were mentioned before.

A. I don't think I have mentioned in my testimony the injury to the leg at the present time.

By Mr. Horton: That is what you are going to mention now?

A. Yes, and the nerves,—I sustained a nervous injury.

By Mr. Horton: All testimony regarding the nerves and flat feet, the Government objects to, as there is no evidence that the director ever passed on that.

Overruled.

Since then I have been extremely nervous, and I sustained another injury, as to the injury to the leg——

By Mr. Horton: Do I understand you that this evidence is objected to without my offering the objections right along?

By the Court: The Court said it had overruled before, the ob-[fol. 80] jection to it; if no error was committed then, none could be committed now; if error was committed then it serves your purpose. Proceed.

A. As to the extent and nature of the injury at the present time, my leg is, has a deep scar wound here, and in moving the leg when it,—the muscle seems to tie, contract down, and there is not,—when the leg is like this, crossed, the depression isn't so much, but when it comes up this way, the leg muscles pull down and it has got a depression, and the surface of the leg from here down to the knee, below the scar, is numb, that is, drags like, and also in walking around in any appreciable amount, why, my leg becomes stiff, and if I walk fast my leg becomes very stiff, and in running it is much worse still.

Q. What was your occupation prior to the time you enlisted in the army?

By Mr. Horton: Objected to as immaterial, in this contract of insurance, what his occupation was.

Overruled.

A. At the time of enlisting in the army I was engaged in farm work, I,—with the exception of the year 1913,—I have never farmed for myself, but,—I worked for other people on the farm, that is, a part of the time for my folks who were farmers, a great portion of the time, I went, followed up such work as harvesting and threshing and corn husking and other work. I never engaged in work other [fol. 81] than farming and farm work, general farm work, except

the very little in certain periods, and so forth, powder work during 1916,—always manual labor of the commonest kind. At the time of my enlistment, I had little less than ninth grade education,—that is, little less than first year high school. I made application or claim for benefit under my insurance contract. The nature of the reply said that in general was that I had to receive compensation of $30.00 a month for total disability.

By the Court: Have you this reply?

A. Yes, sir. It is Exhibit "B" in the case. That is the first thing; since you have the exhibit I won't go further into the contents of it. I had subsequent correspondence with the Bureau in regard to my insurance claim. I have copies of the letters with me.

By Mr. Law: I will offer this in evidence, so it will not be necessary for me to read the correspondence.

By Mr. Horton: It is agreed that the photostat copies of this evidence may be left in the record, and the original retained in the bureau.

By the Court: What have you there?

By Mr. Law: I have all the correspondence passing between Mr. Law and the bureau.

By the Court: Have you copies?

By Mr. Horton: I have copies, yes, sir.

By the Court: Furnish the copies to Mr. Law, and let them be introduced, if he is satisfied with them.

[fol. 82] By Mr. Law: Yes, sir, this will be offered in evidence, I will just simply submit them.

By the Court: You desire to offer them now?

By Mr. Law: I will offer them now.

By the Court: Very well, let them be fastened together and given an exhibit number. This is the correspondence you carried on with the Bureau of War Risk Insurance?

A. It is.

By the Court: Admitted.

The photostat copies of such correspondence, so received in evidence without objection, marked Plaintiff's Exhibit 3, are in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT NO. 3

C-137,959. April 5th, 1920.

Mr. De Witt Law, 519 Front Street, Missoula, Montana.

DEAR MR. LAW: This office is in receipt of your communication dated March 25, 1920, in which you make inquiry in regard to the status of your claim for compensation.

In reply thereto you are respectfully advised that under date of March 20th, 1919, an award of compensation in the amount of $80.00 per month was made in your favor effective as of February 11th, 1919, which award continued until you started your voca-

[fol. 83] tional training at which time you were directly under the supervision of the Federal Board for Vocational Education.

You are further advised that in accordance with the decision rendered by our Chief Medical Advisor your disability cannot be rated as permanent and total.

All future communications relative to this case should bear our file number C-137,959.

Yours very truly, R. H. Hallett, Assistant Director, in Charge of Compensation and Claims Division, per —— ——. JAR/on.

War Risk Insurance, Admin—

Mar. 30, 1920.
R-38. Mail Section.

Missoula, Mont., March 25, 1920.

From Law, De Witt, Pvt., Co. C. 137th Inf., C-137,959, to Bureau of War Risk Insurance, Compensation and Insurance Claims Division, Washington, D. C.

Re Award of Compensation

Dear Sir: Please refer to your letter of April 25, 1919, and to my letters of December 4, 1919, and February 17, 1920.

[fol. 84] Will you please advise me if you are giving this matter your consideration. I feel that your Bureau could at least acknowledge the receipt of my claim and advise me as to when I could expect some action in the matter.

I have tried to be patient in this matter, giving a reasonable length of time for your action, but when you fail to answer my letters or give me any assurance that you are even considering my claim I feel obliged to make this demand for some reply.

Please be advised that I expect some acknowledgment from your Bureau as to the status of my case.

Yours very truly,
De Witt Law, 519 Front St., Missoula, Mont.

War Risk Insurance, Administration Division

C-137,959. Feb. 24, 1920.

From Law, De Witt, Pvt. Co. *Co.* 137th Inf., Missoula, Mont., to Bureau of War Risk Insurance, Washington, D. C.

Subject: Award of Compensation

Dear Sir: Please refer to your letter of April 25, 1919, and to my letter of December 4, 1919. Under the date of December 4, 1919, I requested your Bureau to make a further investigation of [fol. 85] my case in that to the best of my knowledge my disability

is permanent and total. You granted me a rating of temporary total disability. As in my letter of December 4, 1919, I wish to appeal from this decision. I enclosed in said letter a copy of the report of Dr. James D. Hobson, U. S. P. H. S., Hammond B, Missoula, Mont.

Please advise me as to what action you have taken in this case.

Yours very truly,

De Witt Law. De Witt Law, 519 Front St., Missoula, Mont.

Rec'd Feb. 19, 1920.

Missoula, Mont., Feb. 17, 1920.

From De Witt Law, Missoula, Mont., to District Headquarters #10, U. S. P. H. S., 744 Lowry Building.

Subject: Application for Compensation

DEAR SIR: Replying to your letter of the 7th instant please be advised that I have been awarded compensation by the Bureau of War Risk Insurance and that my compensation number is C-137959.

The object of my re-examination by Dr. Hobson was to reopen my case for another hearing. I have been granted a temporary total disability but my disability is of such a nature that it will remain as [fol. 86] a permanent disability. A copy of Dr. Hobson's report was mailed to the Bureau of War Risk Insurance.

Yours very truly, De Witt Law. De Witt Law, 519 E. Front St., Missoula, Mont.

War Risk Insurance, Administration Division

Dec. 9, 1919.
Bureau War Risk Insurance, Dec. 10, 1919, Medical Section.
B. W. R. I. File No. C-137,959.
Private De Witt Law, Co. C, 137th Inf.

Missoula, Mont., December 4, 1919.

Bureau of War Risk Insurance, Treasury Department, Washington, D. C.

GENTLEMEN: Your Bureau has granted me an award of $30.00 per month for "Temporary total" disability. To the best of my understanding I am permanently disabled and I wish to have a reconsideration of my case by your Bureau. I feel that I am entitled to the benefits of my Term Insurance. Will you please give this matter your further consideration.

I hand you herewith a report of Dr. James D. Hobson, U. S. P. H. S.

[fol. 87] Please send mail to the address given below.

Yours truly, De Witt Law, 519 Front St., Missoula, Mont.

April 25, 1919.

Mr. De Witt Law, Tyler Star Route, Roundup, Montana.

In re C-137,959

DEAR SIR: Acknowledgement is hereby made of receipt of your communication of recent date in which you state that you desire to make claim for insurance on account of your disability, and beg to inform you that you are now receiving the maximum amount allowed for compensation under the provisions of the Act of October 6, 1917, and the amendments thereto, in view of the fact that the injury received by you has been rated as temporary total and not total and permanent within the meaning of the aforesaid Act.

Government insurance, which is separate and distinct from compensation is payable only upon the death of the insured or upon his becoming totally and permanently disabled within the meaning of the term as used in the War Risk Insurance Act and regulations thereunder. It is therefore necessary for men disabled in the service to continue the payment of the monthly premiums due on their insurance until they have been examined and pronounced totally and [fol. 88] permanently disabled by the Medical Department of the Bureau; otherwise the insurance may lapse for non-payment of premiums. Payment should be made by check, draft or money order payable to the Treasurer of the United States, and addressed to the Disbursing Clerk, Bureau of War Risk Insurance, Washington, D. C.

When communicating with this Bureau, kindly refer to File No. C-137959.

By authority of the Director.

Joseph Connolly, Acting Chief Compensation and Claims,
per —— ——. CC/mer 12.

C-137,959. Private De Witt Law, Serial Number Unknown, formerly of Co. C, 137th Infantry, American Expeditionary Forces. Permanent address: Tyler Star Route, Roundup, Montana.

Attention of Compensation and Insurance Claims Section

Bureau of War Risk Insurance, Treasury Department, Washington, D. C.

GENTLEMEN: I, the above-named enlisted man, was discharged from the Service at Walter Reed General Hospital, Washington, D. C., on February 10, 1919, for disability due to amputation of left arm incurred as result of wounds received in line of duty.

I am receiving $30 per month as compensation for total and per- [fol. 89] manent disability, and wish to make application for insurance benefits under my War Risk Insurance Policy. Please send me blanks for the same.

Yours truly,

De Witt Law.

A. I made payments to the insurance bureau after I sustained my injury. These payments were made from the 28th of September until February—until March 1st. These payments in all amounted to $33.00.

By the Court: What year—March 1st?

A. That was 1919—the payments made after the injury—a total of $33.00 in five payments I believe.

Cross-examination by Mr. Horton:

A. The payments just referred to as having been made were by deductions from my pay in the army. I don't think the last payment made by deduction from my pay was for the month of January, 1919, because they always deducted for the insurance ahead. I paid the premium on my War Risk Insurance for the month of February—that was taken out of my last month's pay; well, that was the custom of all of us to always take it out, and I received letters afterwards, stating that my insurance had lapsed on February——

By the Court: Stating what?

A. Well, I'm not clear on this—I won't make the statement as to this—I will let it go at four months paid; I'm under the impression payment was taken out for February, but since I'm not clear, I will [fol. 90] not stand on it. I was discharged on February 10th, 1919, at Walter Reed General Hospital, Washington. I never paid any premiums after February 10, that was after my discharge, except what was taken out in the army, but it was always the custom to take the payment out of every month's pay. I never made any personal remittance—certainly not. As to whether Plaintiff's Exhibit 3 consists of all the correspondence in the case, it seems to me there is a letter missing. It seems to me that I received, in answer to the fourth letter that I wrote during January, or during the winter of 1919 and 1920, along towards the last, a very brief letter, which stated that they could not—"We cannot grant your claim for insurance." It don't seem to me that this could be the letter, the letter I received at that time, I—those files that I offered in the exhibit here were in the hands of the Red Cross accountant, Mr. Lockwood, here in town, and the correspondence that came from the bureau, with the exception of this notice here, Exhibit "B"—I mean the Exhibit "B" attached to my petition. That is the letter of April 25, 1919, copy of which is attached to Exhibit 3, and with the exception of that I had two or three letters that I had from the bureau with me.

Q. Assuming that there is such a letter as that to which you refer, about when would it have been dated?

A. It would have been dated, well, when——

Q. Well, the date would indicate that this was the answer?

[fol. 91] By the Court: How is that?

By Mr. Horton: This letter of April 5, 1920.

A. Yes, but it don't strike me that that was the contents of the letter. I don't think I received a letter from the bureau after that.

Q. In your first letter to the bureau, which is undated——

By the Court: Just a moment; when is that April 5th letter dated, when?

By Mr. Horton: April 5, 1920.

By the Court: Well, if you have got any other letters what have you done with them?

A. I was going to explain that when I was interrupted; as I stated, this,—the correspondence that I sent out was with Mr. Lockwood, and this one, Exhibit "B," the letter I received, I had with me, and I made a trip back to Iowa during the summer of 1920, and I had these letters in my suitcase, and somebody, while I was sleeping in the car, made away with my suitcase, and containing these letters and other things, so I am unable to produce the letter.

By the Court: Well, anyway, your impression now is that this letter of April 5 is really the letter?

A. The date would indicate that it was, but it don't seem to me to be the contents. If there is such a letter, however, it is dated some time in 1920.

Q. Now, handing you a letter which is marked on the back, "Claims, Compensation and Insurance, April 22, 1919," I will ask you when if you remember, that letter was sent to the bureau,— [fol. 92] about when?

A. Oh, that was dated about——

Q. That was the first letter, wasn't it?

A. Yes, stating that I wished to make application for insurance.

Q. In that letter you use this language: "I, the above-named enlisted man, was discharged from the Service at Walter Reed General Hospital, Washington, D. C., on February 10, 1919, for disability due to amputation of left arm incurred as results of wounds received in line of duty."

A. I didn't write that letter, that letter was written by the Red Cross who looked at me and thought I was entitled to the insurance, and volunteered to start it, and I just simply signed the letter. In reply I received a letter dated April 25, 1919, in which I was advised that my injury had been "rated as temporary total and not total and permanent within the meaning of the aforesaid act." That is the language. I was not advised in that letter that it would be necessary to continue the payment of premiums to keep my insurance in force. They suggested that if I was not permanently and totally disabled, they would like them of course. I wrote again December 4, 1919, stating "I feel that I am entitled to the benefits of my term insurance. Will you please give this matter your further consideration?"

Q. Again, on February 17, 1920, still referring to this same exhibit——

[fol. 93] By the Court: What date is that?

By Mr. Horton: February 17, 1920.

Q. "Replying to your letter of the 7th instant, please be advised that I have been awarded compensation by the Bureau of War Risk Insurance and that my compensation number is C-137959. The object of my re-examination by Dr. Hobson was to re-open my case

for another hearing. I have been granted a temporary total disability but my disability is of such a nature that it will remain as a permanent disability. A copy of Dr. Hobson's report was mailed to the Bureau of War Risk Insurance?"

A. Yes, and in that I referred to the examination of November 29, 1919. And again by a letter dated February 24, 1920, I wrote the Bureau of War Risk Insurance requesting, "a further investigation of my case in that to the best of my knowledge my disability is permanent and total. You granted me a rating of temporary total disability. As in my letter of December 4, 1919, I wish to appeal from this decision. I enclose in said letter a copy of the report of Dr. James D. Hobson, U. S. P. H. S., Hammond B., Missoula, Mont." I wrote the bureau again on March 25, 1920, making claim for permanent rating permanent and total disability. On April 5, 1920, a letter was received by me, in which I was advised as follows: among other things,—"In reply thereto you are respectfully advised that under date of March 20th, 1919, an award of compensation in the amount of $80.00 per month was made in your favor effective [fol. 94] as of February 11th, 1919, which award continued until you started vocational training at which time you were directly under the supervision of the Federal Board for Vocational Education. You are further advised that in accordance with the decision rendered by our Chief Medical Advisor your disability cannot now be rated as permanent and total." The last line was the one that impressed me in the letter. I received no further communication from the bureau subsequent to that time. Well, yes, I took up the case then through a congressman, through Congressman McCormick, who took the case up with me at Washington, for me, and he wrote me some weeks after I sent him this report that he had taken the case up, and he—that is the report of February 14, 1922, and this correspondence with the Congressman was some time after February 14, 1922, and he said that the directors had said that they couldn't give me a rating of permanent and total disability, that their rating was something different, I think,—well, he said the rating was 85% permanent but not permanent and total at this time; that was after this report of Doctor Hobson; the last report of February 14, 1922. Prior to February 14, 1922, I had never filed any claim alleging pes planus or flat feet or neurasthenia. I had always just went to their doctors before and let them examine me, and I was in their hospital for a month before I was discharged, and I was discharged under the ex- [fol. 95] pert supervision, and they had every opportunity to examine me and see what the disabilities were.

Q. But you never filed directly with the Bureau of War Risk Insurance so the director could act on it.

A. I filed my claim on my disabilities. I just simply wanted to take,—I contend that my record shows that I was permanently and totally disabled. Prior to February 14, 1922, I made no specific claims in any official document sent to the bureau for disabilities of alleged flat feet and neurasthenia. I simply submitted myself to their doctors for examination. With reference to Defendant's Ex-

hibit "C," and the swearing to a claim for compensation on Form 536 filed with the bureau I will have to read this over. This is dated at the time I was discharged. Well, I don't know. This is my signature on here. I,—Where was this made out? There has been so many papers that they are all confusing. That is my signature. As soon as I read this over, I will tell you what I gave as cause of discharge. This is one of a number of forms that were filled out. Now, I don't remember the form, but this is my signature on it. These forms were just simply crowded in there and they popped the questions at us and when we would get through they would say "sign here." As to flat feet or neurasthenia, I had made no special claim because I was then all the time under medical supervision, right with the doctors every day, with the government doctors in the hospital; in the army hospital and under their supervision all the time.

[fol. 96] Q. Isn't it a fact that the only claim you had in this——

By the Court: What is the date of that?

By Mr. Horton: It is the 29th day of January, 1919.

By the Court: Were you in the hospital then?

By Mr. Horton: Yes, sir, he was in the hospital.

A. Yes, I was at that time.

By Mr. Horton: And it bears the date of the Claims Division, February 19, 1919, Claims Division, United States Veterans Bureau.

Q. At that time the only claim you made was for amputation of left arm, upper third, was it not?

By the Court: Well, if that is all in the document, it shows for itself.

By Mr. Horton: I offer this document in evidence.

By the Court: Admitted.

The document so received in evidence, being marked Defendant's Exhibit "C," is in words and figures as follows, to wit:

[fol. 97] DEFENDANT'S EXHIBIT "C"

Treasury Department, Bureau of War Risk Insurance C-137, 959. File No. C—28, Form 526. Feb. 10, 1919. 9/21. Law.

Application of Person Disabled in and Discharged from Service

Read with Great Care

You must furnish the information called for in this application, and support your answers with proof called for in these instructions, as part of your claim under the act of Congress of October 6, 1917. Every question herein must be answered fully and clearly. Answers and affidavits should be written in clear, readable hand, or typewritten, and if you do not know the answer to a question, say so.

1. Forward with this application a certified copy of your certificate of discharge from the service. If at the time of your discharge or resignation you obtained from the Director of the Bureau of War Risk Insurance a certificate that you were then suffering from injury likely to result in death or disability, the original or a certified copy of such certificate of disability should be forwarded with this application as part of your claim.

2. You should also enclose a report by your attending or examining physician. If you are receiving treatment in any hospital, sanitarium, or similar institution, you may submit the hospital [fol. 98] report or record of your case, showing your physical condition, the origin, nature and extent of your disability, and the probable duration of such disability.

3. If you have a wife or children, the fact that your wife and children are living must be shown by the affidavits of two persons, who should also state whether you and your wife, and children are living together or apart, and whether or not you are divorced.

4. Your marriage must be proven by a certified copy of the public or church record, or if this is not obtainable, by the affidavits of the clergyman or magistrate who officiate, or by the affidavits of two eyewitnesses to the ceremony, or of two persons who have personal knowledge of your marriage. If either party was divorced from a former wife or husband that fact should be shown by a verified copy of the court order or decree of divorce.

5. Ages of children must be shown by a certified copy of the public record of birth, or the church record of baptism, or if these are not obtainable, by the affidavits of two persons, giving the name of the child, the date and place of birth, and the names of both parents.

6. If claim is made on account of a stepchild, it must be shown by the affidavits of two persons whether such child is a member of the claimant's household, and if claim is made for an adopted child a certified copy of the court letters or decree of adoption must be submitted.

7. If additional compensation is claimed for a dependent parent, [fol. 99] relationship to such parent must be shown by a certified copy of the public record of the claimant's birth, or the church record of his baptism, or, if such evidence can not be obtained, by the affidavits of two persons. Whether or not the dependent parent for whom compensation is claimed is a widow or widower should be shown by the affidavits of two persons, who must state the specific amount of annual income from each separate source, the location and value of all property, real and personal, owned by said dependent, his or her physical condition, employment and earnings, and the amount of the disabled person's average monthly contribution to the support of the dependent parent. The parent claimed for should be one of the persons to make affidavit to these facts if mentally competent.

8. The affidavits of two persons required in support of your claim should be made on the blank form on the last page of this application.

All papers which you send this bureau must bear your full name, former rank, and organization. The number C — must also appear upon each paper.

—— ——, Deputy Commissioner.

Penalty

Sec. 25. That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this act, or by regulation made under this act, makes any statemant of a material fact, knowing it to be false, shall be guilty of perjury and shall [fol. 100] be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

1. Full name—Dewitt Thomas Law.
2. Address—Tylor Star Route, Roundup, Mont.
3. Under what name did you serve? Dewitt Law. (a) Serial No. —.
4. Color—white. Date of birth—Aug. 1, 1893. Place of birth —Humboldt, Iowa.
5. Make a cross (X) after branches of service you served in: General Service X; Limited Service —; Army X; Navy —; Marine Corps —; Coast Guard —.
6. Date you last entered service—June 2, 1917. Place of entry—Burlington, Kans.
7. Rank or rating at time of discharge—Private.
8. Company and regiment or organization, vessel or station in which you last served—Co. C. 137th Infantry 35th Div.
8a. State fully any other service in the military or naval forces of the United States—None.
9 Date and place of last discharge—Walter Reed, Gen'l Hospital, Takoma Park, D. C.
10. Cause of Discharge—Amputation arm, left, upper third.
11. Nature and extent of disability claimed—Total as to former occupation.
12. Date disability began—Sept. 28, 1918.
13. Cause of disability—Result of severe injury by shrapnel incurred while in action with A. E. F.
[fol. 101] 14. When and where received—Sept. 28, 1918, near Verdun, France.
15. Occupations and wages before entering service—farmer—$45 av. month including board, room and washing.
16. Last two employers: Mathew A. Law—Roundup, Mont. 2 mo. Student.
17. Occupations since discharge, dates of each and wages received; if less than before service, why—None.
18. Present employer—None.
19. Name and address of doctor or hospital treating you—Walter Reed Gen'l Hospital, Takoma Park, D. C.

20. Are you confined to bed? No. Do you require constant nursing or attendance? No.
21. Name and address of nurse or attendant—None.
22. Are you willing to accept medical or surgical treatment if furnished? Yes.
23. Are you single, [married, widowed or divorced?] Single.
24. Times married—None.
25. Date and place of last marriage—None.
26. Times present wife has been married—None.
27. Maiden name of wife—None.
28. Do you live together? None.
29. Have you now living a child or children, including stepchildren and adopted children under eighteen years of age and unmarried. None.

[fol. 102] 30. If so, state below full name of each child, and date of birth; if a stepchild or adopted child, so state, and give date child was adopted by you or became a member of your household.

Name of child	Date of birth			Name and address of person with whom child lives
	Day	Month	Year	
None.		None.		None.

31. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless? None.
32. State whether your parents are living together, separated, divorced, or dead—Living together.
33. Give name and address of each parent living—Mathew A. Law, Roundup, Mont. Jennie L. Law, Roundup, Mont.
34. Age of mother—About 48. Age of father—About 56.
35. (a) Is your mother now dependent upon you for support? No.
(b) Is your father *no* dependent upon you for support? No.
(c) If so, your average monthly contribution to your mother—$ None. Your father—$ None.
36. (a) Value of all property owned by your mother—$ Don't know. Your father—$ Don't know.
(b) What is the annual income of your mother—$ Don't know. Your father—$ Don't know.

[fol. 103] 37. Did you make an allotment of your pay? No.
38. If so, to whom? None. Amount—$ None.
39. Give number of any other claims filed on account of this disability, and place filed—None.
40. Did you apply for War Risk Insurance? Yes. $10,000.
41. When and where? Feb. 1918, Camp Doniphan, Okla.
42. Insurance certificate number—Don't know.
43. Name of beneficiary—Jennie L. Law and Mathew A. Law.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

(Signature of Claimant:) DeWitt Thomas Law.

[*Words enclosed in brackets erased in copy.]

Subscribed and sworn to before me this twenty-ninth day of January, 1919, by Dewitt Law, claimant, to whom the statements herein were fully made known and explained. Edward E. Lamkin, [Notary Public.]* Edward E. Lamkin, Captain M. C., U. S. Army.

STATE OF ——,
County of ——, —ss:

—— ——, of ——, in the county of ——, State of ——, — years of age, and ————, of ——, in the county of ——, State of ——, — years of age, being severally sworn according to law, each [fol. 104] for h—self deposes and says:——

—— ——.

Subscribed and sworn to before me, a notary public, this — day of ——, 191–.

—— ——, Notary Public.

A. In reference to signing, at Fort Dodge, Iowa, another form 526 on March 10, 1919, making application for person disabled in, and discharged from service, for the benefits of the War Risk Insurance Act, —yes, I remember signing a paper up there. This was one of the former army men that,—who I received the paper,—I wasn't drawing any compensation,—he drew up a number of papers and I signed them, and what the contents of them were, I don't know.

Q. At that time you claimed that the,—in answer to the question No. 11, "Nature and extent of disability claimed: Loss of left arm and injury to left leg?"

A. Yes, well, that is what they put it.

Q. That is what you told them, wasn't it?

A. Yes, that is what they noted,—I don't remember what I told them—but was that made out after I had received my award of compensation? Why I didn't claim benefits for flat feet and neurasthenia in claim filed under examination of November 29, 1919, [fol. 105] Doctor James D. Hobson, Defendant's Exhibit "B," will say, that from the start I was given to understand that I would receive a total disability on my arm itself, that my arm would render me totally disabled, and since I was to get disability anyway, why, the other injuries, from that standpoint, was entirely immaterial, and I never made any claim on these other injuries. I made no claim specifically to the Bureau of War Risk Insurance, or the United States Veterans' Bureau for flat feet, but I always made them claims on my disability, and they had my record there. I made no claim specifically for flat feet and neurasthenia until this examination held February 14, 1922, by Doctor Hobson, made at my instance and request. At that time, I told Dr. Hobson that I contemplated taking action against the government to recover total disability, but purely as par of that, it didn't make any difference except as to my insur-

[*Words enclosed in brackets erased in copy.]

ance claim, because I was getting total disability anyway, and anyway I was drawing that amount of money, it didn't make any difference whether I put in this other disability or not, except to determine whether permanently and totally disabled. I think I started this action March 20, 1922. Between February 14, 1922, and the starting of this action, I received no communication at all from Washington. As to the allowance or denial of this claim—yes, I did, I received a communication from Congressman McCormick that he had taken the matter up fully with the directors of the bureau, [fol. 106] and that they had denied my claim, and then I received a subsequent communication and they had, he said he urged upon them that my rating be given a permanent status, but that the directors had advised him that under their regulations it was impossible to give me that rating. I have not that letter from Congressman McCormick here, nor the correspondence I had with Congressman McCormick.

Q. Don't you know that the director of the United States Bureau had never been presented with your claim for this disability claimed in your examination of February 14, and in fact they had not had time to reach Washington?

A. I know, as a matter of fact, that the bureau's communications were sent to me, or sent to Mr. McCormick, and forwarded to me, and that these communications in this matter was taken up after these director's garbled report had had ample time to have been before the Bureau. There was no acknowledgement directly from the United States Veterans' Bureau that this claim had been filed and acted upon by the Director—only from Congressman McCormick, and he advised me that in taking it up personally, the claim had been turned down. I have not the dates of these letters. So far as action taken on my claim as set forth in examination of February 14, 1922, well I received that communication from Mr. McCormick. At the time of receiving the communication from Mr. McCormick, I didn't know that this file was at Minneapolis, in the subdistrict office. I could not tell you where it was. I know that [fol. 107] it had had ample time to have been forwarded on, and it was made especially, I especially said this examination was prior to instigating this suit, and told Dr. Hobson I wanted to give them a chance to pass on it. I don't know when Dr. Hobson sent this report in. I don't know when it was received by the Helena office.

Q. You don't know that this examination report ever reached Washington, do you?

A. No, I don't know where it came from. I know it was purported to be sent from the bureau. I never wrote the bureau at Washington any letter making claim for disability by reason of flat feet and neurasthenia. I never wrote any special letters for these injuries because I looked at my—looked at all of my injuries as taken together, to constitute a certain physical status, and that is why I was injured.

Q. As a matter of fact, you never wrote to the bureau about any of your disabilities after the receipt of this letter of April 5, 1920—is that not true?

A. Well I,—that list of correspondence you have there, that was subsequent to that, yes—yes, that refers to Dr. Hobson's report, his original report, the report of November 29, 1919. You see I appeared before him for examination—that is my signature on Government's Exhibit "E." It bears date of May 29, 1919. Wait just a minute until I read this over. That is the claim I filed for vocational rehabilitation.

[fol. 108] Q. In answer to question 6, "What is your disability." did you not answer, "Amputation left arm, upper third," and nothing else?

A. I don't know; that was the—what people looked at at that time was a man with an arm gone. In answer to the question immediately following, "What is your present physical condition—yes, I expect I answered 'Good.' I wanted to get out of the army at that time. I was out of the army May 29, 1919; that was taken afterwards. I was not a student at the Emporia Normal High School, of Emporia, immediately prior to enlisting in the army. I was—no, not immediately prior, I went there about two or three months. I was not there from January, 1917, until my enlistment— no, I was not, I quit—I didn't have anything to do during the winter of 1917 and 1918. I run out of work, and I went to Emporia for about three months, and then I quit school along in April. I did not enlist in the army for two or three months. I quit school and went to work. I think I began at the Emporia Normal School in February. I don't think I was there five months. I think I was there from February until the first of April. I wasn't taking any course—I wasn't taking a course in bookkeeping, I wasn't taking a course in anything. I just wanted to kind of put in the time. I took some bookkeeping at, in Missouri, at a school there; I went there about three months one fall, and then afterwards I worked, I finished working out the set of books, so that I could get credit [fol. 109] from the Emporia State Normal. I worked out the set of books and handed them in to them and they O. K'd them. They just simply gave me a college credit on it. This bookkeeping course—there wasn't any course to it, that was after I was injured, I understand, I simply worked out this set of books from what little I knew, and they very kindly gave me the credit on it. Previous to my enlistment, I wasn't taking a course at the Emporia Normal High School. I think I was taking a little—let's see—I don't know, there, I was taking some algebra and agronomy, as I remember—just a few general high school subjects. I was there from about February until April only—about the first of April when I quit. On Government's Exhibit "F" is my signature. This was a statement from the Federal Board of Vocational Education of what I had been doing.

Q. At that time you claimed your disability was amputation arm, left upper third; did you claim any other disability?

A. Well, these were made out,—this simply asked me what it was, and I naturally just told them none. I never said anything about flat feet. I didn't say anything about my legs either; I think you will find that isn't noted there either,—it didn't make any dif-

ference, because I was entitled to total disability on my arm anyway, and what is the use of saying flat feet and neurasthenia and bum leg, and so forth?

Q. In this statement you said you had been in college for five [fol. 110] months, stenographic course, and bookkeeping?

A. Yes, I had taken about three months bookkeeping, and a month or two, or about two months on the other.

By Mr. Horton: I offer this in evidence, Exhibit "F."

Defendant's Exhibit "F," so offered in evidence, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT "F"

Form No. 502-3

Received from Dist. No. 13 Date 4/7/19. 10-1732. Jas. 35.

Federal Board for Vocational Education

Individual Survey and Record

C. O. No. —

1. Name—Law, De Witt. D. V. O. No. —. Source —.
Present address—Walter Reed Hospital. W. R. I. No. —. Home address—Tyler's Star Route, Roundup, Mont. Notification, —— —, 19—.
Enlisted—June 2, 1917. Place—Burlington Kan. Date of birth —Aug. 1, 1893. Race—White.
Discharged: —— —, 19—. Place: ——. Birthplace—Iowa.
Rank—Pvt. Organization Co. C, 137th Inf.
Phone: ——.

[fol. 111] 2. Father's Name—Mathew A. Law. Address—Tyler's Star Route, Roundup, Mont. Occupation—Farming.

3. Next of Kin's, or nearest friend's name—Mother—Mrs. Jennie L. Law. Address—Tyler's Star Route, Roundup, Mont.

4. Dependents: Is there a dependent wife? No. Number of dependent chidren: ——. Other dependents: ——.

5. Education: Grade completed—8th. Speaks English? Yes. Writes English? Yes. Academic degree—2 yrs. High College ——. Professional or technical school ——. Correspondence, or evening, courses taken ——. Business college, 5 mos. Stenographic course—bookkeeping. Other education (foreign languages, etc.)

6. Disability: Nature of injury or illness—Amputation arm, left upper third. Date of occurrence—Sept. 28th, 1919. Place—France. Time in hospital—17 weeks. Present condition—Good. Nature of permanent disability—Loss of member.

7. W. R. I. Data: Compensation claim filed ——, 19—. Compensation awarded ——, 19—. Memorandum ——. Base pay last month of service, $33.00—

8. Vocational Medical Data: Examined ——, 19—. Can man resume former occupation? No. Why? ——. When can he be-
[fol. 112] gin training? Any time. Artificial appliances being worn ——. Artificial appliances needed —. Type of vocation indicated ——. Will man need special consideration from employers (short hours, rest periods, etc.)? ——. If so, what? ——. Percentage of vocational efficiency —— per cent. Memorandum ——.

9. Vocational Survey—Date Jan. 29th, 1919.

Occupation	Industry	Years	Wages, amount per—
(a) At the time of enlistment: Farming....	.....	12	$.....
(b) Principal civil employment: Farming..	.....	..	$.....
(c) Other occupation: Farm hand.....	.....	3	$.....
(d) Other occupation: ——.....	.....	..	$.....
(e) Other occupation: ——.....	.....	..	$.....

Occupation while in military service ——.
Occupation since discharge ——. Industry ——. Wages, $—— per ——.
Last employer: *Nae* Father. Address ——.
Other employer: Name ——. Address ——.
Training during convalescence—Morcial course.
Occupational preference—Law. Reasons—I have always wanted to take up law. Second preference—Teacher of mathematics.
Remarks on man's preferences—This man is intelligent above the average and ambitious. Occupation recommended—Full course in law.
Industry ——. Reasons—Has the qualities that will make for
[fol. 113] success in his chosen vocation. Position available after training? ——. Industry ——. Wages $—— per ——. Place ——.
Prospects of employment ——.
Transferred to D. V. O. No. —— for ——.
Memoranda (recreations, hobbies, habits, manners, intelligence, etc.)—Baseball, hunting, a reader of everything, frank, honest, good habits, good health, steady, gifted.

(Endorsed on this sheet the following: Rehabilitation Division Received Deb. 24, 1919. Federal Board for Vocational Education Dist. No. 13 ——. Ans'd 2-28 Recorded.)

10. Training Recommended by Vocational Advisor—A full course in law.

11. Method of Training Recommended by Supervisor Training:

Character of training—University course in law.
Place of training—University of Montana.

Estimated duration of training—4 years. Tuition—$—— per —.
Total tuition for course—Paid by State.
Other estimated costs—$100 for books and supplies.

12. Case Board Action—Date ——, 19—.
Training recommended (nature and place of training) ——.
Estimated period — weeks. Total tuition cost, $——.
[fol. 114] Appliances ——. Equipment, etc., $——.
—— ——, District Vocational Officer.
—— ——, Medical Officer.
—— ——, Employer.
—— ——, Employee.

De Witt Law, Disabled Man.

Training disapproved ——, 19—. Reported to Head Office, ——, 19—.
Recommended for placement without training, because ——.

13. Action by Head Office: Course approved, disapproved ——, 19—.
D. V. O. Notified ——, 19—. Memoranda ——.

14. Training: Course in —— at ——. Began ——, 19—. Ended ——, 19—.

15. Placement Data: Position secured ——, 19—. Name of employer ——. Wages, $—— per ——. Address ——. Occupation ——.
Industry ——, Memoranda of Placement Officer ——.
Man quit, discharged, withdrawn ——, 19—, because ——.
New position secured ——, 19—.
Name of employer ——.
Wages, $——, per ——, Address ——. Occupation ——.
Industry ——. Memorandum of Placement Officer ——.
[fol. 115] Transferred to D. V. O. No. — for ——. Released from supervision ——, 19—. Died, ——, 19—.

16. Retraining After Placement: Memoranda ——.

17. Personal Interviews:

Date	Officer	Report	Date	Officer	Report
Jan. 29th, 1919....	E. E. M.	....	....	....	....

Memoranda ——. Case closed, ——, 19—.
For signatures of officers making this report:
Sections 1 to 10 Filed by E. E. Myers Title ——.
Sections ——. Filed by ——. Title ——.
Sections 11 — Filed by ——. Title Ass't Sup't of Training.
Sections ——. Filed by ——. Title ——.

Q. This was an election by you, as stated on its face.

By Mr. Law: I object to any evidence in regard to Vocational Training, as entirely immaterial, nothing coming under the contract.

By the Court: I think possibly you are right; it will be received, and if it is not entitled to any consideration the Court will give it none; for the sake of the record the objection will be overruled and the exception noted.

Exception noted.

By Mr. Horton: I offer this in evidence as Exhibit "G."

Defendant's Exhibit "G," so received in evidence, is in words and figures as follows, to wit:

[fol. 116] DEFENDANT'S EXHIBIT "G"

Form 115 R

Federal Board for Vocational Education, Division of Rehabilitation

File Numbers: ——.
Law, De Witt.
Received Aug. 9, 1919. District Office No. 10-1732. Federal Board for Central Office No. R-10-3918. District Office No. W. R. I. Bureau No. C-137959. Vocational Education D. V. O. #10.

Election of Course

For and in consideration of the payments to be received by me under the provisions of the Vocational Rehabilitation Act during the period of training, and the benefit to be derived by me from such training, I hereby elect to follow the course of vocational training prescribed for me by the Federal Board for Vocational Education in Law extending over a period of four years, at University of Montana.

I also agree to conscientiously and faithfully follow the course prescribed, to perform to the best of my ability the work required of me and to comply with the established rules and regulations of said institution and with such rules and regulations as may be adopted from time to time by the Federal Board for Vocational Education.

During the course of training I shall not reside with my dependents.

De Witt Thos. Law.

[fol. 117] This period is subject to extension or reduction in the discretion of the Board depending upon conduct, need and scholarship.

By Mr. Law: That is my signature on Defendant's Exhibit "H," dated September 27, 1919.

By the Court: What is this?

By Mr. Horton: This is his beginning of his training at the University.

By the Court: It will be received on the same terms; if not compatent or material the Court will give it no consideration.

Admitted. Exception.

Defendant's Exhibit "H," so received in evidence, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT "H"

742 Metropolitan Bank Building. Phone: N. W. Main 1660, Automatic 31451.

Federal Board for Vocational Education, Division of Rehabilitation, District No. 10, Minneapolis

Z-115-B

Notice of Date of Commencement

(Date:) Sept. 27, '19.

To District Vocational Officer, District #10, Metropolitan Bank Building, Minneapolis, Minn.

DEAR SIR: This day I commenced my training at University of Mont. as directed by you.
[fol. 118] I will attend classes regularly each day.
(Signed) De Witt Thos. Law.

St.: 519 Front.
City: Missoula, Mont.
NOTE.—Be sure to date this day you start training and mail immediately, as any delay is serious.

(Received Oct. 1, 1919. Federal Board for Vocational Education D. V. O. #10.)

By Mr. Law:

I have been constantly in attendance at the University of Montana from September 27, 1919, to the present time. I have not been paid during all that time from September 27, at the rate of $80.00 per month. Every man out there, regardless of—as to his disability, whether it was 10% disability or 100, I want to say that every man, or nearly every man, gets $100.00 a month. For a time I drew $80.00 a month—From September 27, 1919, to June 1, 1920. From that time, I drew $100 a month. The government director wants us fellows to be rehabilitated and they are footing the bill. I am not hired to go to school though.

Q. Will you produce for the court, or can you produce before the court any letter or decision or paper of any kind from the United States Veterans' Bureau or the director of the United States Veterans' Bureau, denying or disagreeing with your claim as filed on your physical examination by Dr. Hobson, February 14, 1922?

A. The bureau never did answer any direct claim directly; they [fol. 119] always evaded them, were evasive with the answer, as the

correspondence will show; it is usually a matter of three or four months time, and then it is simply an evasive answer; that has been the attitude of the bureau, as the correspondence will show.

By Mr. Horton: Move to strike out as not responsive.

By the Court: It may stand; if not entitled to any consideration the Court will give it none.

A. I think I can produce, could produce a letter from Mr. McCormick.

By Mr. Horton: Move to strike out as not responsive.

By the Court: I think it is. Motion denied.

A. I'm trying to think just what the contents of that letter from Mr. McCormick was, at the present time, or was. This letter that I referred to was signed by Mr. Fulton, the Director of the Bureau, and it does not,—he doesn't come out and openly say what he is going to do, but he takes it,—takes my correspondence with him, as though I had left it to him, and asked to take up,—he described my insurance, and in place of answering my questions he just says, "in regard to Mr. Law's insurance," and so forth, "you are hereby advised,"—"and that he took out insurance on" such and such a day, and then goes ahead and says, "if Mr. Law wants to reinstate his insurance he can do so by" such and such means. Mr. McCormick took my case up for me. That was the most direct way of getting at it in my opinion.

[fol. 120] Q. Mr. Law, you have been making your law classes out there at the University right along, you have been advancing from the freshman to the sophomore and the junior year, with your class in law studies?

A. Not hardly that fast, no, I'm only commencing, as far as that goes,—I'm only about half through, as far as that goes.

By Mr. Law: This testimony, your Honor, will be treated as——

By the Court: Oh, yes, as long as not competent or material—it might have some bearing on your physical condition, however, and it might be competent for that purpose.

By Mr. Law: I am appearing in person as my own attorney to prosecute this case.

By Mr. Horton: If your Honor please, I move to strike out this testimony of the witness as to anything from Congressman McCormick, as being hearsay, in this case.

By the Court: Well, it is in, and I don't think you are entitled to any such motion; the motion will be denied.

Exception.

By Mr. Law: I want at this time to offer in evidence the deposition of Dr. Conyngham, as to the nature of my disabilities.

By Mr. Higgins: We desire to object to the introduction of it, for various reasons. We want to interpose the major objection to this deposition of Dr. Conyngham, for the reason that at the time the

[fol. 121] deposition was taken the contract for insurance herein sued on was,—had lapsed, for failure to pay premiums on the same by the plaintiff; for the further reason that this said deposition does not show this plaintiff to have been permanently or totally disabled, and the deposition shows that the Doctor never examined the plaintiff prior to October, 1919.

By the Court: Overruled.

By Mr. Higgins: Exception.

By Mr. Law: (Reading from deposition of Dr. E. F. Conyngham): I have known De Witt T. Law, the plaintiff in this action, since October, 1919. He resided at my home from October, 1919, to the latter part of August, 1921. I also served as his medical adviser. I am an operative physician. I graduated from Minneapolis College of Physicians and Surgeons in 1886; from University of Minnesota 1887; post graduating in mental and nervous diseases; of Edinburgh, Scotland, 1894. Have engaged in general practice since that time, specializing in mental and nervous diseases.

Question 5. Have you ever examined the plaintiff; if so state when and under what circumstances?

Answer. I examined him in October, 1919, and numerous subsequent occasions. Examinations occurred pursuant to severe nervous attacks at night.

By Mr. Higgins: We object to interrogatory number 5, and the answer thereto, for the reason that there has been no disagreement with the Government, in this case, with reference to any nervous con-
[fol. 122] dition of the plaintiff.

By the Court: The objection comes too late, and is overruled.

Question 6. State what you observed at that time, if anything that indicated that the plaintiff was suffering from nervous infirmities?

By Mr. Higgins: We want to object to question 6, for the reason that there is no disagreement between the Government, that is, the Director of the United States Veterans Bureau and the plaintiff, with reference to a nervous condition and flat feet.

Overruled. Exception.

A. Traumatic neurasthenia, manifested through intention (tremor) trembling voice, and mental distraction. Of course I observed the articular amputation of the left arm at the shoulder joint, briesment of the front of left thigh, and falling arch of left foot, in the third degree, and right foot in first degree.

Question 7. From your observation made at the time referred to in your last answer, state from what nervous ailment, if any, in your opinion, the plaintiff was then suffering?

By Mr. Higgins: We object to that on the same grounds as the objections to interrogatory Number 5.

Overruled.

Answer. Stated in foregoing answer.

Question 8. Explain the nature of the nervous ailment referred to in your last answer?

[fol. 123] By Mr. Higgins: We object to that on the same ground as offered to interrogatory No. 5.

By the Court: Proceed.

By Mr. Higgins: Exception.

Answer. Is produced by severe physical injury coupled with intense nervous strain.

Question 9. If you found at the time you first examined the plaintiff that he was suffering from a nervous ailment, state whether it was severe or light?

By Mr. Higgins: We object to number 9, upon the same ground as number 5.

Overruled.

Answer: Severe.

Question 10. Referring to your last answer, state whether it was permanent or temporary, in your opinion.

By Mr. Higgins: Objected to on the same grounds as offered to Number 9.

Answer. Permanent.

Question 11. Referring to the time you first examined the plaintiff, as above stated, state what vocation, application, concentration and work the plaintiff might, in your opinion, have performed without rendering said nervous condition more serious.

By Mr. Higgins: We object to that on the same grounds as set forth in the objection to Question 5.

By the Court: The Court gets tired of ruling on objections which [fol. 124] are simply repetitions. Proceed. Go ahead and read your deposition.

Answer. None. The proper treatment should, in his case,—should have been absolute rest. The plaintiff was under my personal observation, residing at my home, as aforesaid, from October, 1919, to August, 1921; his capacity for concentration and work remained about the same, but his ability to sleep was considerably improved during the latter part of period mentioned. I do not remember dates of subsequent examinations but will state that I examined him during each month since October, 1919, sometimes as frequently as one to three times a week. The falling of the arch of left foot was in the third degree and of the right foot in the first degree. Forced marches, heavy packs, deficient feeding, nervous strain and long convalescing are the most frequent causes of flat feet. I examined the plaintiff's left thigh approximately a dozen times since October 1, 1919, the last time being the 30th of September, 1922. I observed a considerable depression of the conformation of his left thigh. I consider the infirmity permanent, rendering left thigh and limb from thirty to fifty per cent below normal efficiency.

By the Court. The record will show an objection by the defendant to all of this line of testimony in the deposition offered, and the exception noted, with reference to neurasthenia and flat feet.

[fol. 125] TESTIMONY OF ROBERT FULLER FOR PLAINTIFF

ROBERT FULLER, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Law:

By Mr. Fuller: My name is Robert Fuller. I live at 732 Gerald Avenue, in Missoula, during school. I attended school here during the year 1919, living at 519 East Front Street, the home of Dr. E. F. Conyngham. I recognize you as one of the boys who stayed at that house. You were my room mate.

Q. While you were rooming with me did you observe any disability other than the injury to the leg and the injury, the loss of the arm?

A. Yes.

By Mr. Horton: Objected to on the first ground that it is an assumption that he did know the disability; on the second ground, that no foundation is laid for it; and on the third ground that there is no circumstances with respect to anything other than the arm and the leg.

Overruled. Exception.

Q. What was my general actions?

By Mr. Horton: Objected to as being ambiguous, indefinite and uncertain.

Overruled. Exception.

A. I would say that rather uncontrolled, at times, indicating more or less nervous condition. It was more noticeable at some times than others. It was most noticeable at night Upon entering my study, at school, and finding you in bed, I would take the ordinary pre-
[fol. 126] cautions that anyone would, finding anyone asleep in a room, and I rarely succeeded in getting in without waking you. You most usually awakened on turning on of the light, and having been asleep you would sit up in bed and give evidence of extreme agitation and nervousness. You would sit up in bed very quickly and staring eyes, and apparently not realizing exactly what was taking place.

Cross-examination by Mr. Higgins:

By Mr. Fuller: I have known plaintiff since October 1, 1919. I am in the department of business administration at the Univer-

sity. I roomed for a while with the plaintiff. I would go back and forth between my rooming place with the plaintiff. He walked over and back with me. That was our custom to walk back and forth between his room and the University.

Q. There was no impairment——

By Mr. Law: I object; he has testified nothing as to my injuries.

By the Court: Proceed.

By Mr. Fuller: It was a little less than half a mile from where I roomed at this time to the University.

Q. And you had observed this plaintiff as he walked?

By Mr. Law I object to this line of testimony.

By the Court: Well, it is cross-examination; we will see; if it is not competent or material the Court will give it no consideration.

[fol. 127] Q. Was there an impediment in his locomotion?

A. Well, naturally, a one-armed man, trying to carry books, there would be.

Q. But other than the fact that he has this one arm?

A. Not to my knowledge.

TESTIMONY OF C. W. LEPHEART FOR PLAINTIFF

C. W. LEPHEART, called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination by Mr. Law:

My name is C. W. Lepheart. I am Dean of the Law School of the University of Montana. You are one of my students. I have observed your handwriting.

Q. Will you state what is the nature of my writing,—that is, is it such that——

By Mr. Horton: Objected to, unless we know what the purpose of this line of examination is.

By the Court: What is the object?

By Mr. Law: The object is to show that as a matter of fact that my handwriting is such that it would preclude me from engaging in any clerical work or anything in the nature of record work.

By the Court: Well, he may answer, if it is not material and not entitled to any consideration the Court will give it none.

A. It is almost indecipherable. It is extremely difficult to read his examination papers.

[fol. 128] Cross-examination by Mr. Higgins:

A. I am familiar with his signature.

Q. Showing you Defendant's Exhibit 1, do you recognize the writing on that document?

A. That may be his, but it doesn't look it, I must say; of course, his examination may be given under greater strain. That, I would say, does not look at all like his examination papers. I know, because I know his writing by his examination papers.

Q. And it doesn't look like it?

By the Court: Perhaps you have some terrifying examinations.

A. I can tell his paper by the extreme quiver, nervous, almost indecipherable on examination; that is a very good example of writing (referring to Defendant's Exhibit 1). I couldn't recognize the signature "De Witt T. Law" on the basis of the examination papers. If this is his true signature on its petition, there is some difference between the way he writes for you and the way he writes his examination papers.

TESTIMONY OF E. M. ROBERTS FOR PLAINTIFF

E. M. ROBERTS was called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination by Mr. Law:

By Mr. Roberts: My name is E. M. Roberts. I am attending the law school at the University. I am a former service man.

Q. While in the service did you take out insurance under the [fol. 129] Government War Risk Insurance Act?

By Mr. Horton: We object to this as having no bearing on this case.

By the Court: Objection overruled, if this testimony is not competent or material it will not be considered.

Exception.

Q. Have you ever received any benefits under this Act?

By Mr. Horton: We object to this; what benefits this witness may have received would have no bearing on the issues.

Overruled.

A. Yes, I received benefits from the day I was wounded. At the time I was wounded, and the time the War Risk Insurance had knowledge of my affliction, they didn't know that I was blind, and being a prisoner in Germany, and when I got to this country they paid me from the time that I was wounded, on my insurance. I also drew my army pay, $30.00 a month, and was given back my premium money. After my discharge I drew my $100.00 compensation along with my insurance. I drew compensation from September 27, 1919. I have not drawn compensation since I entered vocational training. I draw now $57.50 from the Bureau of War Risk Insurance and $145.00 from the Federal Board. I am taking a law course at the University.

Q. You are able to follow that course successfully, are you?

[fol. 130] By Mr. Horton: Objected to; this hasn't any bearing.

Objection sustained.

Cross-examination by Mr. Higgins:

By Mr. Roberts: I lost my sight in the service. I am totally blind. I receive $145.00 for vocational training, the $100 is paid to me personally and the $45.00 to my wife and dependents. I receive $57.50 in addition.

Q. Under your contract of insurance, for being totally and permanently disabled on account of the loss of your sight?

A. I am unable to answer that, as I don't know whether I am drawing it for, under loss of eyesight,—they didn't have knowledge of the loss of eyesight until I came back to this country, so I don't know what I am drawing it under. I am totally blind now. I am drawing——

Q. And you are drawing then $57.50 under your contract of insurance?

A. Yes, I don't know whether I am drawing it under the insurance, as I said before, I don't know whether I am drawing that from the loss of eyesight, because they had no knowledge of loss of eyesight until I came back to this country.

Q. Well, the bureau has knowledge of it now, haven't they?

A. They have.

Whereupon plaintiff announced plaintiff rests.

By Mr. Higgins: May it please the Court, at this time I wish to offer a formal motion.

[fol. 131] By the Court: If you submit your case now, you submit it; if you submit your motion you rest your case on the result of the motion.

By Mr. Higgins: Exception to ruling of Court. We submit it on this motion.

By the Court: Very well, proceed.

By Mr. Higgins: Now comes the defendant, the United States of America, said defendant having rested its cause, and moves the Court for judgment in favor of said defendant, on the following grounds :

1. That said plaintiff has failed to prove that he is now, or ever has been, permanently and totally disabled, within the meaning of the contract of insurance granted to him by said defendant.

2. That said plaintiff has failed to prove that he is permanently and totally disabled within the meaning of the War Risk Insurance Act, and amendments thereto, the rules and regulations of the Bureau of War Risk Insurance, and the United States Veterans Bureau, or the published terms and conditions of soldiers' and sailors' insurance published by the director of the Bureau of War Risk In-

surance, with the approval of the Secretary of the Treasury of the United States of America, on October 15, 1917.

3. That said plaintiff has failed to prove that he became permanently and totally disabled within the meaning of his contract of insurance, while said contract of insurance was in full force and effect, or at any other time.

4. That said plaintiff has failed to prove that while his insurance [fol. 132] contract was in full force and effect he suffered, or now suffers, any impairment of mind or body which rendered or renders it impossible for him to follow continuously any substantially gainful occupation, or that any such impairment of mind or body was, or is, founded upon conditions which render it reasonably certain that it will continue throughout the life of said plaintiff.

5. That by plaintiff's evidence in this case, it is affirmatively shown that said plaintiff is not now, or has ever been, actually, and in fact, permanently and totally disabled.

6. That plaintiff's evidence affirmatively shows that plaintiff has been continuously following, since September 27, 1919, the occupation of a student of law in the University of Montana, and as such student has been paid by defendant Eighty Dollars ($80.00) per month, from September 27, 1919, to July 1, 1920, and from that date has been paid by defendant One Hundred Dollars ($100.00) per month to the present time.

7. That said plaintiff has failed to prove, by any evidence in this case, that he is entitled to judgment against the defendant upon any ground whatsoever.

By Mr. Higgins: We want to make a motion for special findings. Let the record show that the motion for findings is made.

By the Court: Very well.

By Mr. Horton: May we add another objection? That no disagreement has been shown or established between the plaintiff and the defendant, respecting any liability on the part of the defendant. [fol. 133] By the Court: What is that,—your motion?

By Mr. Horton: Another ground for the motion.

By the Court: Very well.

By Mr. Horton: That said plaintiff has failed to prove that a disagreement existed, or exists, between said plaintiff and this defendant, as required by the provisions of Section 13 of the Amendments of May 20, 1918, prior to the beginning of this action, to wit, March 21, 1922, in that, it affirmatively appears in evidence that this defendant was never afforded an opportunity, prior to the beginning of this action, to pass upon, or determine, nor did it ever, prior to the beginning of this action, pass upon, or determine, the nature, extent and degree of plaintiff's alleged disabilities, as set forth in the plaintiff's petition.

By Mr. Horton: That will be the eighth ground.

Thereafter, on July 13, 1923, the decision of the Court was duly filed herein, in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MONTANA

No. 1016

LAW

vs.

U. S.

DECISION

This action involves a War Risk Insurance contract. [fol. 134] Plaintiff enlisted in defendant's army in June, 1917, the contract issued in Feb., 1918, and his injuries were received in battle in Sept., 1918. These latter were shell wounds involving loss of his left arm at the shoulder, loss of some tissue of his left thigh, and neurasthenia. Theretofore and in the service he had developed flat feet.

Upon discharge, the Bureau of Insurance rated him of temporary total disability and he was paid compensation accordingly. Later in 1919, defendant provided him with vocational training in law to continue four years, and compensation $80 to $100 per month, which he accepted and has enjoyed. He contended, however, that he was entitled to payments by virtue of the contract of insurance. This defendant denied, and this action was begun in March, 1922, tried in October, 1922, plaintiff his own counsel throughout.

He is native-born, and at enlistment was 24 years old, sound, of common schooling, and of farm laborer vocation. From the evidence it does not appear reasonably probable that his flat feet are of permanent if any occupational disability. In respect to his neurasthenia, a physician in whose home plaintiff resided from October, 1919, to August, 1921, testifies by deposition in October, 1922, that it manifested itself by "trembling voice and mental distraction" and "it was permanent" in his opinion; that he made numerous examinations of plaintiff; that when the first was made in October, 1919, plaintiff could have performed no "concentration and work" "without rendering said nervous condition more serious," that "the proper [fol. 135] treatment would have been absolute rest"; that during said period of observation, plaintiff's capacity for concentration and work remained about the same but his ability to sleep was considerably impaired." He also testified that the injury to plaintiff's left thigh is permanent and diminishes the leg's normal efficiency from 30% to 50%. Another physician testified orally that plaintiff's neurasthenia is "mild," and that the injury to his thigh disables him 10%, cannot say how much permanent disability from it, but in an occupation requiring plaintiff to be on his feet, would not "hinder except to a minor extent."

At the time of trial, plaintiff in the law school of the University of Montana had studied more than three years, and although yet of trembling voice, manifested no lack of power of concentration and no distraction.

And upon his feet he moved about with facility, though he testified that the muscles of the left leg "knot" and from walking it becomes "stiff."

It does not appear reasonably probable that plaintiff's neurasthenia is of permanent occupational disability, but it does thus appear that his injured thigh is.

And that the loss of his left arm is of permanent occupational disability is obvious. Whether plaintiff's ailments and injuries reduced him to a state of "total permanent disability" within the intent and meaning of Article 4 of the War Risk Insurance Act, 40 Stat. 409, is the determinative issue.

Said Act supersedes pension laws and their policy of gratuities, [fol. 136] sounds in contract throughout, and is of unprecedented liberality. It creates a bureau and director with express power (otherwise implied) to make all necessary rules to execute the Act but none "inconsistent with" it, grants allowances to families of all enlisted men, grants to officers and men and their dependents, compensation based on death and disability reducing earning capacity not less than 10%, Art. 3, and for "greater protection" than this compensation affords, offers to officers and men insurance against death or "total permanent disability," Art. 4.

The director is authorized to "determine upon and publish the full and exact terms and conditions of such contract of insurance," again, of course, to any extent reasonable and not inconsistent with the Act.

In the latter is no definition or limitation of the term "Total permanent disability," and after the contract in suit had issued and in March, 1918, the director made a "regulation" that "any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in articles 3 and 4, to be total disability," and deemed to be "permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life" of the disabled person.

Thereafter and in June, 1918, Congress amended both the compensation and insurance provisions of the Act, 40 Stat. 609, but [fol. 137] again without defining or limiting the term "total permanent disability."

In December, 1919, it again amended said Act, 41 Stat. 371, and in the compensation provisions inserted a proviso "that the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden shall be deemed to be total, permanent disability."

The Act, clearly enough, in its insurance feature was intended to afford the soldier the advantages of the ordinary life and accident

insurance which was no longer available to him save at rates proportionate to a soldier's risk and prohibitive to his purse. It is a substitute for a common, valuable, necessary and well-known institution, both intended to serve the like purpose and to accomplish the like end, and in reason and the nature of things the contracts of both in so far as like in terms must be like in construction. As in any government contract, the act and contracts by virtue of it must be interpreted and construed by the same rules as are like statutes and contracts involving none but private parties.

The analogy between the contracts of this act and those of accident insurance is not close, for that amongst other variations the latter as a rule associate words of definition and limitation in respect to disability that the former do not.

Nevertheless, general rules of construction of accident insurance contracts have applicability to contracts like this at bar. Congress [fol. 138] must have intended as it must have known, that as usual, resort would be had to all the usual aids to arrive at its intent and meaning.

So in respect to this contract as to those of accident insurance generally, the term "Total permanent disability" must be taken in reasonable and practical (here, perhaps even liberal) sense relative to the status of the beneficiary and to be determined largely by the circumstances of his particular case. The insurance like enlistment extends to all soldiers, of infinite diversity of ability and variety of vocation. It is to compensate them for earning capacity destroyed, the earning capacity the soldier had before its destruction.

In determining as a question of fact the extent of the destruction and consequent disability, the inquiry is not to be restricted to the vocation the soldier may have followed, but extends to any other gainful vocation that it is reasonably probable he can follow with reasonable effort and success.

The soldier's capacity or ability to earn, and not merely the vocation in which he has earned, is the test of disability.

A tea-taster or singer or the like might suffer total permanent destruction of his special talent without just claim to any disability, for that he has capacity to successfully follow a multitude of other gainful occupations; or he might suffer like destruction of a hand, foot, eye, with like consequence, for that his earning capacity as tea-taster, singer or the like is unaffected.

[fol. 139] On the other hand, a common laborer suffering like destruction of his ability for manual toil, might have no other ability or capacity to earn, and so be justly rated of total permanent disability, despite speculation and conjecture that he might become a tea-taster, lawyer, doctor, artist, author or philosopher and of greater earning capacity than before, and despite however willing he be to make the effort.

In any case when earning ability or capacity is destroyed to an extent that no substantial portion remains on its merits to serve demand and to secure market, there is total disability; and if it be reasonably probable that this status will long continue, is not temporary, the disability is total and permanent in legal contemplation

and within the intent and meaning of article 4 of the Act. And that status once determined, it will be presumed to continue so far as insurance is due it, until the end of totality or permanency is a proven fact.

A common laborer by dismemberment thus disabled from manual toil, is of total permanent disability in ordinary, reasonable and practical meaning of the term and of Article 4 aforesaid, however flattering the speculation or hope that in some learned career eventually he may become of greater earning capacity than before.

For reasons aforesaid, there is inability to formulate any general rule more definite than that of relativity and circumstances as aforesaid. Evidently Congress appreciated this truth, and not only refused to enact a general rule, but in passage of the Act as it was [fol. 140] when this contract issued rejected two of limitation if not of definition, viz., one in the first amendment of the original act, 40 Stat. 102,—payment in case of "permanent disability which prevents the person injured from performing any and every kind of duty pertaining to his occupation;" and one in the bill as it first passed the House,—payment "while disability is total so as to make it impracticable for the injured person to pursue any gainful occupation."

In literal interpretation both of these would nullify the law in the matter of compensation for total disability, and to this extent would defeat its object.

Incidentally, the first rejected definition was associated with a provision that loss of one arm would be rated at 65% of the permanent disability defined, but this provision was rejected with the definition. The act leaves it to the director to define the term "total permanent disability," and confers power of correction on the courts if his definition be not reasonably within the intent and meaning of Congress. His attempt in that direction, by the regulation aforesaid, taken literally is more extreme and destructive of the spirit of the Act, if possible, than either of those rejected by Congress as aforesaid.

For he stipulates for the "impossible" and for the "certain," neither of which is a reasonable standard, exists but rarely in disputed facts, has any place in judicial determination. In the circumstances it is not believed Congress by silence or amendment has accepted the director's regulation or approved it as a correct expres- [fol. 141] sion of Congressional intent and meaning.

The amendment aforesaid, 41 Stat. 371, declaring certain injuries and condition shall be deemed total permanent disability, is subsequent to and cannot affect this contract, even if unreasonably construed to imply that none other injuries or condition would create that status. In the latter event it is now legislation and not merely valid interpretation. And it is not to be overlooked that said amendment was enacted after war ended, fears abated, ardor cooled, and when the tendency was to some — evade if not repudiate generous promises to the soldiers theretofore made in the Insurance Act and otherwise. This Congressional expression in December, 1919, is

not a safe guide to that congressional intent and meaning in June 1917.

In view of the premises it is believed and found that by and in consequence of the injuries received in service, plaintiff then was and yet is totally permanently disabled within the intent and meaning of Art. 4 of the Act. It is not even suggested by the defense that he has substantial earning capacity that on its merits and not favored by quasi charity would serve demand and secure market.

It is true that on occasion some exceptional men in unusual circumstances, injured like plaintiff, make way and place to substantial extent. Not in these but in the average and ordinary is the rule to determine disability. In fact the defendant rates plaintiff as totally disabled, but since he accepts vocational training and compensation, [fol. 142] may arrive at the bar, it rates him temporarily and not permanently totally disabled and denies he is entitled to insurance.

For this error the director's invalid regulation counting on the "impossible" and on the "certain" is in part responsible, as is defendant's failure to recognize that it contracted to pay both compensation and insurance.

As the latter is to be paid only "during total and permanent disability," if and when plaintiff's ambition, industry, developed ability and perseverance create new earning capacity as a lawyer, insurance payments to him will be no longer due; and that, however slowly business is secured for exercise of the new capacity, however long is his and the usual prenticeship in practice of more economy than law, the event is yet "on the knees of the Gods," and impairs not his past and present right to insurance.

The consequences of any success from his extraordinary efforts voluntarily made and that could not be required is not to be anticipated. The conclusion is that plaintiff is entitled to recover the stipulated instalments of $57.50 per month from and after September, 1918, to date, or $3,335.

Judgment accordingly.

July 13, 1923. Bourquin, J.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS

And now, in furtherance of justice, and that right may be done, the defendant, the United States of America, tenders and presents [fol. 143] the foregoing as its bill of exceptions in this case to the action of the Court, and prays that the same may be settled and allowed, and signed and sealed by the Court and made a part of the record and the same is accordingly done this 1st day of December, 1923.

Bourquin, Judge of the District Court of the United States for the District of Montana.

Service of the foregoing bill of exceptions acknowledged and copy received this — day of November, 1923.

—— ——, Attorney in Propria Persona for Plaintiff

Received by the Clerk for delivery to the Court this — day of November, 1923.

—— ——, Clerk of the United States District Court for the District of Montana.

Filed this 1st day of December, 1923.

C. R. Garlow, Clerk of the United States District Court for the District of Montana.

[fol. 144] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed Nov. 12, 1923

And now comes the United States of America, defendant herein, and says:

That on the 20th day of August, 1923, this Court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this [fol. 145] cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

John L. Slattery, United States Attorney; W. H. Meigs, Ronald Higgins, Assistant United States Attorneys, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 12, 1923

The defendant in this action, in connection with its petition for writ of error, to the United States Circuit Court of Appeals of the Ninth Circuit, makes the following assignment of errors, which it avers exist:

1. The Court erred in finding that plaintiff was permanently and [fol. 146] totally disabled within the meaning of the War Risk Insurance Act and Acts supplemental thereto.

2. The Court erred in finding that the regulations definding permanent and total disability, under the War Risk Insurance Act and Acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and Veterans' Bureau, were in excess of authority.

3. The Court erred in finding that the regulations defining permanent and total disability, under the War Risk Insurance Act and Acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the director thereof, and the Veterans' Bureau and the director thereof, were repugnant to and in contravention of the meaning and intent of said Acts.

4. The Court erred in finding that the War Risk Insurance Act and Acts supplemental thereto, provide for insurance similar in kind to accident insurance, and that said acts and contracts of insurance issued thereunder, should be interpreted and construed according to the principles of law governing accident insurance.

5. The Court erred in interpreting and construing plaintiff's contract of insurance in the light of the principles of law governing the interpretation and construction of contracts for accident insurance.

6. The Court erred in failing to find that the War Risk Insurance Act and Acts supplemental thereto provide for a special statutory kind of insurance and that the contracts of insurance issued under said [fol. 147] Acts are not governed by the rules and principles of law governing other kinds of insurance.

7. The Court erred in admitting testimony showing disability of plaintiff, there being no testimony to prove a disagreement existing between plaintiff and defendant at time of institution of suit.

8. The Court erred in failing to find that no disagreement existed between plaintiff and defendant prior to the institution of suit.

9. The Court erred in not rendering judgment herein in favor of defendant for the reason that the plaintiff's contract of insurance had lapsed for nonpayment of premium and terminated before commencement of suit.

10. The Court erred in finding that defendant was a farm laborer and that such was his vocation before entering the military service of the United States of America, and that the impairment to the earning capacity of plaintiff in such employment, by virtue of his disabilities, constituted him permanently and totally disabled within the intent and meaning of the War Risk Insurance Act and Acts supplemental thereto.

11. The Court erred in compelling defendant to elect to stand on its motion for judgment in favor of defendant, made at the con-

clusion of plaintiff's case, and not allowing defendant thereafter to introduce testimony in its behalf.

12. The Court erred in not granting the motion of defendant for judgment against plaintiff, made at the conclusion of plaintiff's case.

[fol. 148] 13. The Court erred in holding that "it is not even suggested by the defense that he (plaintiff) has substantial earning capacity that on its merits and not favored by quasi-charity would serve demand and secure market," the defendant not being allowed by ruling of Court to introduce testimony after submitting its motion for judgment.

14. The Court erred in rendering judgment herein in favor of the plaintiff and against the defendant.

15. The Court erred in entering herein a judgment in favor of the plaintiff and against the defendant.

Wherefore, defendant prays that said judgment be reversed and said District Court be directed to enter judgment herein in favor of defendant, as prayed for in the answer of defendant, and such other and further relief as to the Court may seem proper.

John L. Slattery, United States Attorney for the District of Montana; W. H. Meigs, Ronald Higgins, Assistant United States Attorneys for the District of Montana, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Nov. 12, 1923

On this 12th day of November, 1923, the above-named defendant, appearing by its attorney, Ronald Higgins, Assistant United States Attorney for the District of Montana, and filing herein and presenting to the Court its petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by defendant, and praying also that a transcript of the record and proceedings and papers, upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had, as may be proper in the premises,

Now, on consideration thereof, the Court does allow the writ of error as prayed for by the defendant.

Bourquin, Judge of the District Court of the United States for the District of Montana.

[fol. 150] [File endorsement omitted.]

[fol. 151] CITATION—In usual form; filed Nov. 13, 1923

[Omitted in printing]

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT OF ERROR

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judge of the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings, as also in the rendition of judgment of a cause in the said District Court before you, between De Witt T. Law, plaintiff, and the United States of America, defendant, a manifest error has happened, to the great damage of the said United States of America, as by its petition and assignment of errors herein appear; and, we being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same in the city of San Francisco, State of California, in said Circuit, within thirty (30) days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

[fol. 153] Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 12th day of November, 1923.

C. R. Garlow, Clerk of the District Court of the United States for the District of Montana. (Seal.)

THE ANSWER OF THE HONORABLE THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA TO THE FOREGOING WRIT.

The record and proceedings whereof mention is made, with all things touching the same, I hereby certify under the seal of said District Court, to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court. C. R. Garlow, Clerk.

[File endorsement omitted.]

[fol. 154] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 12, 1923

To the clerk of the above-entitled court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to incorporate in such transcript of record, the following papers, to wit:

1. Petition.

2. Summons.

3. Answer.

4. Replication.

5. Defendant's motion for trial without jury.

6. Opinion of Court sustaining defendant's motion for trial without jury.

7. Defendant's motion for specific findings of fact, separately stated.

8. Judgment.

9. Bill of exceptions.

10. Petition for writ of error.

11. Assignments of errors.

12. Order allowing writ of error.

13. Writ of error.

[fol. 155] 14. Citation on writ of error.

15. Copy of this præcipe.

16. Certificate of clerk to transcript of record.

17. Acknowledgment by defendant in error of service of papers on writ of error.

18. Any other file, paper or assignment required to be incorporated in a transcript of the record herein, under the practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 12th day of November, 1923.

John L. Slattery, United States Attorney; W. H. Meigs, Ronald Higgins, Assistant United States Attorneys, Attorneys for Defendant.

[File endorsement omitted.]

[Title omitted]

[fol. 156] Service of the petition of the above-named plaintiff in error for writ of error, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, assignments of errors of said plaintiff in error, order allowing writ of error, citation to writ of error, and bill of exceptions of said plaintiff in error herein, præcipe for transcript of record and receipt of copies respectively thereof in the above-entitled cause, are hereby admitted this 16 day of November, 1923.

De Witt T. Law, Attorney in Propria Persona for Defendant in Error.

[File endorsement omitted.]

[fol. 157] In United States District Court

Præcipe for Additional Transcript of Record

To the clerk of the above-entitled court:

In addition to the papers requested by the plaintiff in error to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, you are hereby requested to incorporate in the transcript of record requested by the plaintiff in error, the following papers, to wit:

1. Assignment of error to the United States Supreme Court.

2. Acknowledgment of service of papers on writ of error to the Supreme Court of the United States.

3. Order allowing writ of error to the Supreme Court of the United States.

4. Citation on writ of error to the Supreme Court of the United States.

5. Writ of error to the Supreme Court of the United States.

6. Petition for writ of error to the Supreme Court of the United States.

De Witt T. Law, Plaintiff, in Person.

Certificate to foregoing paper omitted in printing.

[fol. 158] Clerk's Statement re Præcipe for Additional Transcript of Record

On the same day, to wit, November 12, 1923, that the plaintiff in error herein sued out the writ of error incorporated in this transcript, said plaintiff in error also sued out a writ of error in the Supreme

Court of the United States, and this cause is now pending before the Supreme Court of the United States upon said writ of error. The assignment of errors and other papers mentioned in the foregoing [fol. 159] præcipe being identical with the like papers hereinbefore incorporated in this transcript, except the title of the court and the return day of the writ of error and citation, are here omitted for the purpose of reducing the size of this transcript.

C. R. Garlow, Clerk U. S. District Court, District of Montana.

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE—Filed Dec. 11, 1923

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 147 pages, numbered consecutively from one to 147, is a full, true and correct transcript of the record and proceedings in said cause, and of the whole thereof, required to be incorporated therein by præcipes filed, as appears from the original records and files of said court, in my custody, as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Sixty-six and 55/100 ($66.55) Dollars.

[fol. 160] Witness my hand and the seal of said court this 7th day of December, A. D. 1923.

C. R. Garlow, Clerk United States District Court, District of Montana. (Seal.)

[File endorsement omitted.]

[fol. 161] IN UNITED STATES CIRCUIT COURT OF APPEALS

At a Stated Term, to wit, the October Term, A. D. 1923, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Courtroom Thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the Fifth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Twenty-four.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; the Honorable William H. Hunt, Circuit Judge; the Honorable Frank H. Rudkin, Circuit Judge.

No. 4158

UNITED STATES OF AMERICA, Plaintiff in Error,

vs.

DE WITT T. LAW, Defendant in Error

ARGUMENT AND SUBMISSION

Ordered above-entitled cause argued by Mr. Edward H. Horton, Associate Counsel U. S. Veterans Bureau, counsel for the plaintiff in error, and by Mr. De Witt T. Law, in propria personam, and submitted to the court for consideration and decision.

[fol. 162] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER TO FILE COPIES OF OPINION AND JUDGMENT

By direction of the Honorable William B. Gilbert, William H. Hunt, and Frank H. Rudkin, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Decree or Judgment be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein:

* * * * * * *

[Title omitted]

[fol. 163] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Before Gilbert, Hunt and Rudkin, Circuit Judges

OPINION—Filed May 12, 1924

HUNT, Circuit Judge:

This is an action against the United States to recover for alleged permanent total disability incurred by Law while serving in the United States Army, the disabilities consisting of loss of left arm, injury to left leg from shell wound, weakening of the arches of the feet and nervous infirmity. The government denied permanent and total disability, within the intent and meaning of the War Risk Insurance Act, and pleaded that Law's contract of insurance lapsed March 31, 1919, by reason of non-payment of premiums. By repli-

cation Law pleaded that premiums were not due because on September 28, 1918, prior to discharge, petitioner had become permanently and totally disabled in the service. The case was tried to the Court and judgment for $3,335 was rendered in favor of plaintiff below.
[fol. 164] Law enlisted in Kansas on June 2, 1917, and was honorably discharged February 10, 1919. He lost his left arm and was wounded in battle in France. When discharged his physical condition was reported as good except for loss of limb, and he was rated temporarily totally disabled and compensation paid accordingly. The certificate of insurance issued by the United States under the War Risk Insurance Act and the acts supplemental thereto, entitled him to insurance in the sum of $10,000, "payable in case of death or total permanent disability in monthly installments of $57.50." The certificate was made subject to the payment of premiums required and was issued under the authority of the act amending an act entitled an Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department, approved September 2, 1914, and for other purposes, approved October 6, 1917 (40 Stat. 398) and subject in all respects to the provisions of such act "and any amendments thereto and to all regulations thereunder now in force or hereafter adopted," all of which, together with the application for the insurance and the terms and conditions published under authority of the act, should constitute the contract.

Before enlistment Law had worked on a farm and at the time of enlistment his education was less than first year high school. In the winter of 1916-1917 he was in school and continued his studies until the month of April, 1917. He had taken a five months' course, consisting of several months of bookkeeping and stenography, and after discharge from the army he completed his course in bookkeeping at the Normal School in Kansas. He has taken vocational training under the auspices of the government in the law school in the University of Montana, where he has been in attendance from [fol. 165] September 27, 1919, to the date of the trial of the present case during which time he has been allowed by the government $80 each month from September 27, 1919, to June 1, 1920, and $100 per month from June 1, 1920, to the date of trial. He appeared in his own behalf in the prosecution of this action in the District Court and before the Court of Appeals.

Inasmuch as the District Court found that it does not appear reasonably probable that the flat feet and nervous condition complained of are permanent disabilities, we can eliminate those two matters in considering the question whether plaintiff was permanently and to-ally disabled within the meaning of the War Risk Insurance Act, and the acts supplemental thereto.

Examination of the act shows four main articles: Article I, which in a sense is the organic part, defines the duties and powers of the director, and provides for administration, execution and enforcement of the provisions of the act. The director, subject to the general direction of the Secretary of the Treasury, is given full power and authority to make rules and regulations not inconsistent with the

provisions of the act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the act except as otherwise provided in sections 5 and 405. In article II provision is made for allotments and family allowances, and how such allotments may be computed and how paid. Article III provides for compensation for death or disability resulting from personal injury suffered, or disease contracted, in the line of duty and for the amounts payable in case of death. Article IV, commencing with section 400 of the act, grants insurance "against the death or total permanent disability" of any person who, among others, was an enlisted man. The [fol. 166] broad purpose of the insurance feature, as announced in section 400, is to give greater protection insurance for soldiers and their dependents than is provided in article III just heretofore referred to. The director, subject to the general direction of the Secretary of the Treasury, is required to determine upon and publish the full and exact terms and conditions of the contract of insurance (section 402). The insurance is not assignable and not subject to the claims of creditors of the insured or the beneficiaries, and is made payable only to certain related persons, and also "during total and permanent disability" to the insured person. Payments shall be in two hundred and forty equal monthly installments. Provision may be made for maturity, continuous installments, and such other matters for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, and may be provided for in the contract of insurance or from time to time by regulation.

Total permanent disability must exist in order to make the greater protection available. Whether such a condition exists must depend upon facts in the concrete case presented by the insured. It would be practically impossible to lay down a hard and fast rule; indeed, obviously it might be unjust to attempt to do so. Common knowledge tells us that in one person, as, for instance, in a frail delicate body, a condition of total permanent disability may exist as the direct result of certain physical conditions, while in a vigorous, strong body almost exactly similar conditions might produce but partial and temporary disability. What is total and permanent disability is not merely the inability to pursue the calling which the claimant followed before his disability. The statute fixes no criterion with respect to any one calling, but takes up the physical con- [fol. 167] dition and facts of each case. Of course, no interpretation which is against reasonable common sense can be sustained, nor can any be upheld if in conflict with the declaration in the amendment of December 24, 1919. (41 Stat. 373, 374). Section 302, (3) wherein Congress provided in effect that compensation shall be allowed if and while the disability is rated as total and permanent, provided, however, that the loss of both feet or both hands, or sight of both eyes, or loss of one hand and sight of one eye, or becoming helpless and permanently bedridden, shall "be deemed to be total permanent disability."

The fact that by Regulation No. 11, which was issued March 9, 1918, after Law's contract, the director defined total permanent dis-

ability, does not make the regulation ineffectual, provided the definition is not inconsistent with the meaning of the act (40 Stat. supra) and its terms and conditions. The regulation is that total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantial gainful occupation, and that "total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." (Supreme Tent vs. King, 79 Ill. App. 145; Joyce on Insurance, sec. 3032). In adopting such a definition, the director exercised power conferred by the statute, Congress imposing upon him the duty of ascertaining conditions under which payment of insurance should be made or denied.

We have considered the cited cases which involve the interpretation of accident insurance contracts. They are not controlling, for War Risk Insurance is of a materially different character, being in [fol. 168] large part based upon considerations other than those which enter into a purely business relationship of accident indemnity contracts. The distinction has been recognized by the Comptroller of the Treasury, who has pointed out that War Risk Insurance established by the statute is not an out and out contract of insurance on an ordinary business basis, nor yet a pension, but that "it partakes of the nature of both." (Decision of Comptroller, July 5, 1919; Caserello vs. United States, 271 Fed. 488). A liberal construction of the statute should be adopted, but, of course, the courts always are bound by the limitations of the statute and by regulations properly made by the director, pursuant to the authority conferred by the law. (Helmholz vs. Horse, 294 Fed. 417).

Our conclusion is that the motion by the United States for judgment should have been granted, and that for error in denying that motion the judgment must be reversed and the cause remanded with directions to enter judgment in favor of defendant below.

Reversed and remanded.

[File endorsement omitted.]

[fol. 169] In United States Circuit Court of Appeals

[Title omitted]

Judgment—Filed May 12, 1924

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court with instructions to enter judgment in favor of the defendant in said District Court.

[File endorsement omitted.]

[fol. 170] In United States Circuit Court of Appeals

[Title omitted.]

Petition for and Order Allowing Writ of Error—Filed June 18, 1924

Your petitioner, De Witt T. Law, defendant in error in the above entitled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the twelfth day of May, reversing a judgment of the District Court of the United States for the District of Montana, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependant in any wise upon the opposite parties to the suit of controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue-laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error: and therefore your petitioners would respectfully pray that a writ of error be allowed him in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said defendant in error may be revealed, and if error be found, corrected according to the laws and customs [fol. 171] of the United States.

De Witt T. Law, Defendant in Error.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to laws in the sum of $250.00.

Dated San Francisco, California, June 18, 1924.

Hunt, United States Circuit Judge.

[File endorsement omitted.]

[fol. 172] In United States Circuit Court of Appeals

[Title omitted]

Assignment of Errors—Filed June 18, 1924

And now comes the plaintiff in error, De Witt T. Law in person, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, and in the rendition of the final judgment therein,

manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the District Court of the United State for the District of Montana for three thousand three hundred and thirty five dollars ($3,335), entered on the twentieth day of August, 1923, in favor of said plaintiff in error and against said defendant in error.

Second. Said Circuit Court of Appeals erred in reversing the finding of facts made by the Court below.

Third. Said Circuit Court of Appeals erred in reversing the Court below on a question of fact.

Fourth. Said Circuit Court of Appeals erred in failing to find that the term "permanent and total disability" must be considered in a practical sense to be within a reasonable common sense interpretation of the term.

Fifth. Said Circuit Court of Appeals erred in failing to find that the opinion of the court below was a reasonable common sense interpretation of the term permanent and total disability.

[fol. 173] Sixth. Said Circuit Court of Appeals erred in reversing the lower court's finding, that plaintiff's disabilities totally incapacitated him from following any available occupation upon which he could rely in earning a livelihood.

Seventh. Said Circuit Court of Appeals erred in finding that a common laborer must be of a frail delicate body before dismemberment of an arm would render him permanently and totally disabled.

Eighth. Said Circuit Court of Appeals erred in adopting the assumption that the Court below had limited the inquiry to the calling which claimant had followed before his disability.

Ninth. Said Circuit Court of Appeals erred in finding that plaintiff had taken a course in Bookkeeping at the Normal School in Kansas.

Tenth. Said Circuit Court of Appeals erred in finding that plaintiff had completed a course in bookkeeping.

Eleventh. Said Circuit Court of Appeals erred in finding that plaintiff had ever, at any time prior to date of judgment, acquired an available earning capacity, other than as common laborer.

Twelfth. Said Circuit Court of Appeals erred in failing to find that a substantial destruction of available earning capacity caused by injuries of a permanent nature would constitute a permanent and total disability.

Thirteenth. Said Circuit Court of Appeals erred in finding that the adoption of Bureau regulation No. 11 was a reasonable definition of the term permanent and total disability, which was sanctioned by judicial authority.

Fourteenth. Said Circuit Court of Appeals erred in failing to find that plaintiff's total disability within the contemplation of the War Risk Insurance Contract was based upon conditions which were reasonably certain to continue throughout his life.

Fifteenth. Said Circuit Court of Appeals erred in finding that a reasonable interpretation of the term permanent and total disability would include the consideration of speculative occupational possibilities not available to the insured at the time of injury.

[fol. 174] Sixteenth. Said Circuit Court of Appeals erred in failing to rule that a reasonable interpretation of the term permanent and total disability would not include the consideration of speculative occupational possibilities.

Seventeenth. Said Circuit Court of Appeals erred in finding that the Court was bound by Bureau regulations issued for the purpose of adjudicating claims under the contract of insurance.

Eighteenth. Said Circuit Court of Appeals erred in finding that plaintiff's total disability was not permanent and total within a reasonable conception of the term.

Nineteenth. Said Circuit Court of Appeals erred in failing to find that any ambiguity in the War Risk Insurance Contract as a whole should be strictly construed against the framers of the Contract.

Twenty. Said Circuit Court of Appeals erred in failing to find that a total disability caused by injuries or afflictions which were reasonably probably to continue throughout life was a permanent and total disability.

Twenty-one. Said Circuit Court of Appeals erred in finding that a total disability must be founded upon conditions which renders it reasonably certain that total disability will continue throughout the life of the person suffering from it before it can be permanent and total.

Twenty-two. Said Circuit Court of Appeals erred in failing to find that a total disability caused by an injury which was certain to continue throughout the life of the person suffering from it was a permanent and total disability.

Twenty-three. Said Circuit Court of Appeals erred in failing to rule that what would constitute a total disability in the original compensation act would likewise constitute a total disability in the War Risk Insurance Contract, and that the disability need only also be permanent to be permanent and total.

Twenty-four. Said Circuit Court of Appeals erred in finding that [fol. 175] Congress had imposed upon the Director of the Bureau the power of ascertaining the conditions under which payments of insurance should be made or denied.

Twenty-five. Said Circuit Court of Appeals erred in failing to find that the Director of the Bureau had no power to alter the exact terms and conditions of the contract of insurance.

Twenty-six*t*. Said Circuit Court of Appeals erred in finding that the Court's adjudication of the term permanent and total disability was bound by the subsequently enacted Congressional interpretation of the term defining permanent and total disability for compensation purposes.

Twenty-seven. Said Circuit Court of Appeals erred in justifying the War Risk Bureau's adjudication of peti-oner's claim for insurance, by subsequently enacted Congressional definitions of the term permanent and total disability for compensation purposes.

Twenty-eight. Said Circuit Court of Appeals erred in finding that the subsequent declaration of Congress defining permanent and total disability for compensation purposes was controlling in adjudicating petitioner's claim for permanent and total disability under the insurance contract.

Twenty-nine. Said Circuit Court of Appeals erred in finding that the lower court's adjudication of petitioner's claim for permanent and total disability was in conflict with subsequent declarations of Congress defining the term for compensation purposes.

Thirty. Said Circuit Court of Appeals erred in failing to find that petitioner's contract of insurance was yearly renewable term insurance and must be interpreted in the light of statutes in existence at the time of petitioner's injury.

Thirty-one. Said Circuit Court of Appeals erred in failing to rule that petitioner's rating of total disability should have been permanent and total and insurance payments made accordingly during his permanent and total disability.

[fol. 176] Thirty-two. Said Circuit Court of Appeals erred in failing to rule that any regulation issued by the director which altered the ordinary conception, and formerly adjudicated interpretation of the term was in excess of authority.

Thirty-three. Said Circuit Court of Appeals erred in finding that petitioner's contract of insurance was not an out and out contract.

Thirty-four. Said Circuit Court of Appeals erred in ruling that the War Risk Bureau's regulation No. 11 was properly made by the director.

Thirty-five. Said Circuit Court of Appeals erred in finding that the fact the petitioner was insured by the government while engaged in hostile military service would in any way alter the generally accepted judicial interpretation and meaning of the terms used in the contract.

Thirty-six. Said Circuit Court of Appeals erred in failing to find that the fact the petitioner was insured by the government while engaged in hostile military service would not in any way alter the generally accepted judicial interpretation of the terms used in the contract.

Thirty-seven. Said Circuit Court of Appeals erred in failing to find that the contract of insurance herein was a government undertaking to insure petitioner and as such was binding within the generally accepted judicial interpretation of the terms set forth in the insurance section of the War Risk Insurance Act, and within the Exact Terms and Conditions Published thereunder.

Thirty-eight. Said Circuit Court of Appeals erred in failing to find that what would constitute permanent and total disability within an accident insurance contract would also constitute a permanent and total disability within the War Risk Insurance Policy and in ruling that the interpretation of permanent and total disability adjudicating the term in accident policies was not controlling in adjudicating the like term used in the War Risk Insurance Contract.

Thirty-nine. Said Circuit Court of Appeals erred in finding that the nature of the Consideration paid for insurance protection would [fol. 177] materially alter the government undertaking and preclude recovery within the generally accepted interpretation of the contract.

Forty. Said Circuit Court of Appeals erred in failing to find that peti-oner was insured for protection against the loss of earning capacity available to him at the time of entering into military service, and that the term permanent and total disability must be intrepreted in the light of circumstances and occupational capabilities existing and available for earning capacity at the time of injury.

Forty-one. Said Circuit Court of Appeals erred in failing to intrepret peti-oner's contract of insurance in accordance with well established contractual principles, and in reversing the *the* judgment of the court below under a view that the government was not bound by the exact terms and conditions of the contract set forth in the original undertaking.

Forty-two. Said Circuit Court of Appeals erred in failing to find that peti-oner had a constitutional vested rights to benefits purchased under the War Risk Insurance Contract.

Forty-three. Said Circuit Court of Appeals erred in failing to protect peti-oner's vested rights to benefits purchased within the insurance contract against deprivation through administrative forces and influences.

Forty-four. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favour of said defendant in error for cost of suit.

Forty-five. Said Circuit Court of Appeals erred in reversing the judgment of the court below for the reason that said Circuit Court of Appeals was without jurisdiction to review the case.

Forty-six. Said Circuit Court of Appeals erred in failing to find that the judgment of the Court below was conclusive of peti-oner's rights.

Wherefore, the said De Witt T. Law, plaintiff in error prays that for the errors aforesaid and other errors appearing in the record of the said United States Circuit Court of Appeals in the above entitled [fol. 178] cause to the prejudice of plaintiff in error, the judgment of the Circuit Court of Appeals be reversed, annul-ed, and for naught esteemed, and that judgment be entered affirming the decree of the United States District Court in the cause herein, and that the court make such other orders as may be deemed necessary in affirming and re-enstating the judgment entry of the District Court, for the State of Montana, to the end that justice may be done in the premises.

De Witt F. Law, Plaintiff, in Person.

[File endorsement omitted.]

[fol. 179] Bond on Writ of Error for $250.00—Approved and filed July 1, 1924; omitted in printing

[fol. 180] [Title omitted]

Service of the petition of the above-named plaintiff in error, for writ of error to the United States Supreme Court, assignments of errors of said plaintiff in error, order allowing writ of error, writ of error, citation to writ of error, præcipe for transcript of record and receipt of copies thereof in the above entitled cause, are hereby admitted this 26th day of June, 1924.

John L. Slattery, United States Attorney for Montana.

[File endorsement omitted.]

[fol. 181] In United States Circuit Court of Appeals

[Title omitted]

Præcipe for Transcript of Record—Filed July 3, 1924

To the clerk of the above-entitled court:

You are hereby requested to make a transcript of the record to be filed in the United States Supreme Court, pursuant to a writ of error

allowed in the above-entitled cause, and to incorporate in such transcript of record, the following papers, to wit:

1. Printed transcript of record on file in Circuit Court.

2. Bill of exceptions on file in Circuit Court.

3. Transcript of record filed in Circuit Court incorporating the following:

1. Petition.

2. Summons.

3. Answer.

4. Replication.

5. Defendant's motion for trial without jury.

6. Opinion of the Court sustaining defendant's motion for trial without jury.

7. Defendant's motion for specific findings of fact, separately stated.

8. Judgment.

9. Petition for writ of error.

10. Assignments of errors.

11. Order allowing writ of error.

12. Citation on writ of error.

13. Writ of error.

14. Certificate of clerk to transcript of record.

[fol. 182] 15. Acknowledgment of Service.

16. Copy of præcipe on record.

4. Judgment of the Circuit Court of Appeals.

5. Writ of Error to the Supreme Court.

6. Petition for Writ of Error to the Supreme Court.

7. Assignment of error to the Supreme Court.

8. Citation on writ of error to the Supreme Court.

9. Proof of service of papers on writ of error to the Supreme Court.

10. Opinion of the Circuit Court of Appeals.

11. Copy of this præcipe.

12. Certificate of Clerk to transcript of record.

13. Any other file, papers or assignments required to be incorporated in a transcript of record herein under the practice of the United States Supreme Court.

De Witt T. Law, Plaintiff in Error.

Dated this 24 day of June, 1924.

Service hereof accepted and copy received this 26th day of June, 1924.

John L. Slattery, United States Attorney for Montana.

[File endorsement omitted.]

[fol. 183] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

CLERK'S CERTIFICATE

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and eighty-two (182) pages, numbered from and including 1 to and including 182, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on writ of error from the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion filed in said Circuit Court of Appeals in the above-entitled case, made pursuant to præcipe of plaintiff in error filed July 3, 1924, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon writ of error from the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of July, A. D. 1924.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.
(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 184] In United States Circuit Court of Appeals

[Title omitted]

Writ of Error

United States of America, ss:

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between De Witt T. Law, plaintiff in error, and The United States of America, defendant in error, a manifest error hath happened, to the great damage in the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, toge*ht*er with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Wm. Howard Taft, Chief Justice of the [fol. 185] United States, the 18th day of June, in the year of our Lord one thousand nine hundred and twenty four.

F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, by Paul P. O'Brien, Deputy Clerk.

Return to Writ of Error

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 7th day of July, A. D. 1924.

The Judges of the United States Circuit Court of Appeals for the Ninth Circuit. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. (Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[Endorsed:] No. 4158. In the United States Circuit Court of Appeals for the Ninth Circuit. Docketed. De Witt T. Law, Plaintiff in Error, — The United States of America, Defendant in Error. Writ of Error. De Witt T. Law, Plaintiff in Error. Filed Jun. 18, 1924. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

[fol. 186] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

DE WITT T. LAW, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error

CITATION ON WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein De Witt T. Law is Plaintiff in error and The United States of America, defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated this 18th day of June, 1924.

W. H. Hunt, United States Circuit Judge.

Due and legal service accepted and copy received this 26th day of June, 1924.

John L. Slattery, U. S. Attorney for Montana.

[fol. 187] [Endorsed:] No. 4158. Docketed. In the United States Circuit Court of Appeals for the Ninth Circuit. De Witt T. Law, Plaintiff in Error, — The United States of America, Defendant in Error. Citation on Writ of Error. De Witt T. Law, Plaintiff in Error. Filed Jul. 3, 1924. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

Endorsed on cover: File No. 30,515. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 550. De Witt T. Law, plaintiff in error, vs. The United States of America. Filed July 23rd, 1924. File No. 30,515.

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AUTHORITIES CITED

Supreme Court of the United States

De Witt T. Law,

Plaintiff in Error.

vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action at law was commenced by the plaintiff below herein called the petitioner to recover under a contract of insurance providing indemnity in the event of permanent and total disability.

Under Act of Congress of October 6, 1917, the United States government amended the War Risk Insurance Act of 1914, enacted for the purpose of insuring vessels engaged in European commerce, and as a part of such amendment, among other provisions repudiated the then existing pension laws, and provided a measurable compensation, based upon destruction of earning capacity, to be paid to men injured in military service under article III of said amendment, and for a greater protection authorized the

Director of the War Risk Bureau, now the Veterans Bureau, to issue policies at stipulated premiums insuring men in military service against death or permanent and total disability, as Art. IV of said amendment.

At the time of the publication of the exact terms and conditions of the Contract according to the provisions of the Act of Congress, petitioner was engaged in military service of the United States government and a few months thereafter was induced to subscribe for insurance under Art. IV of the said amendment in the amount of Ten Thousand Dollars, which policy was kept in full force until petitioner was discharged from his army occupation because of the shoulder amputation of his left arm and a partial incapacitation to his left leg.

The Contract of insurance contains no definition or limitation of the term permanent and total disability in either the application for insurance, the exact terms and conditions of the Contract, or in the Act of Congress authorizing the Contract, but as a part of the Act of Congress it was provided that the Director of the Bureau was empowered and directed to promulgate and publish the exact terms and conditions of the Contract and to adopt reasonable rules and regulations not inconsistent with the Act of Congress for the purpose of administration of insurance benefits and then provided further that in event of disagreement between the Director of the Bureau and any beneficiary under the Contract of insurance an action on the claim may be brought in the United States District Court.

The unrefuted evidence submitted at the trial established that prior to the American participation in the recent war the petitioner was a common laborer, engaged principally in farm work, which occupation was abandoned by him on

August 5, 1917, for the purpose of entering the military service of the United States Government.

At a date about eight months subsequent to the issuance of the Contract of insurance herein the petitioner received his injuries while in active military service, and upon discharge from the army, under certificate of good health except for the afflictions sustained, was awarded a rating of temporary total disability, but upon making application for insurance payments contending that he was permanently and totally disabled he was informed by the Director of the Bureau that the War Risk Insurance Medical Board had found petitioner temporarily totally disabled rather than permanently and totally disabled and accordingly petitioner's application for insurance must be denied. Subsequent communications with the bureau insisting that petitioner was both permanently and totally disabled proved futile, and as a final recourse the action herein was instigated in March, 1922, and decision rendered in favor of the petitioner in July, 1923, which decision was reversed by the Circuit Court of Appeals in May, 1924.

Upon plaintiff resting his case after proving in substance as above the Government moved the Court for judgment without submitting rebuttal testimony and under a ruling of the Court submitted their case on a contention of insufficiency of evidence to support a judgment under the contract of insurance and upon a further contention of insufficiency of evidence to prove a disagreement with the Veterans' Bureau prior to the instigation of suit.

The case herein was tried before the Court sitting without a jury and at the trial of the cause petitioner proved that at the time of entering into the insurance Contract with the Government, and of sustaining his injuries, peti-

tioner was a common laborer and knew nothing of any other means of earning a livelihood, and relied upon and established his claim easily within previous adjudications of the term permanent and total disability. In passing upon the applicability of previous adjudications of the term the District Court expressed the following opinion:

> "The act, clearly enough, in its insurance feature was intended to afford the soldier the advantage of the ordinary life and accident insurance which was no longer available to him save at a rate proportionate to a soldier's risk and prohibitive to his purse. It is a substitute for a common, valuable, necessary, and well known institution both intended to serve a like purpose and to accomplish the like end and in reason and nature of things the contract of both in so far as like in terms must be like in construction. As in any government contract, the act and contract by virtue of it must be interpreted and construed as are like statutes and contracts involving none but private parties."

In reversing the decision of the lower Court the Circuit Court of Appeals rendered the following opinion:

> "We have considered the cited cases which involve the interpretation of accident insurance contracts. They are not controlling, for War Risk Insurance is of a materially different character, being in a large part based upon a consideration other than those which enter into purely business relationship of accident indemnity contracts."

By virtue of the power conferred by Congress, the Director of the Bureau promulgated the purported full and exact terms and conditions which among other things provided that:

> The contract of insurance should be in accordance with a specified general form "which may be changed by the Bureau from time to time, provided that the full and exact terms and conditions thereof shall not be altered thereby," and the "full and exact terms

and conditions" of the contract further provided that insurance with interest basis of 3 1/2 per cent should become payable in 240 equal monthly installments at $57.50 each and payable:

"To the insured if he, while the insurance is in force, shall become permanently and totally disabled commencing with such disability as established by the award of the Director of the Bureau and continuing during such disability."—R. 8. 10

After men of military service were induced to subscribe for the contract of insurance and while the men were isolated from their affairs by military service the Director of the Bureau, under color of right to issue reasonable regulations for administrative purposes, adopted a regulation again specifying the conditions under which insurance payments were to be made, and has subsequently adjudicated and restricted the rights of insurance claimants to the new conditions imposed by the Director.

ASSIGNMENT OF ERRORS.

First: Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the District Court of the United States for the District of Montana for three thousand three hundred and thirty-five dollars ($3,335), entered on the twentieth day of August, 1923, in favor of said plaintiff in error and against said defendant in error.

Second: Said Circuit Court of Appeals erred in reversing the finding of facts made by the Court below.

Third: Said Circuit Court of Appeals erred in reversing the Court below on a question of fact.

Fourth: Said Circuit Court of Appeals erred in failing to find that the term "permanent and total disability" must be considered in a practical sense to be within a reasonable common sense interpretation of the term.

Fifth: Said Circuit Court of Appeals erred in failing to find that the opinion of the Court below was a reasonable common sense interpretation of the term permanent and total disability.

Sixth: Said Circuit Court of Appeals erred in reversing the lower Court's finding, that plaintiff's disabilities totally incapacitated him from following any available occupation upon which he could rely in earning a livelihood.

Seventh: Said Circuit Court of Appeals erred in finding that a common laborer must be of a frail, delicate body before dismemberment of an arm would render him permanently and totally disabled.

Eighth: Said Circuit Court of Appeals erred in adopting the assumption that the Court below had limited the inquiry to the calling which claimant had followed before his disability.

Ninth: Said Circuit Court of Appeals erred in finding that plaintiff had taken a course in bookkeeping at the Normal School in Kansas.

Tenth: Said Circuit Court of Appeals erred in finding that plaintiff had completed a course in bookkeeping.

Eleventh: Said Circuit Court of Appeals erred in finding that plaintiff had ever, at any time prior to date of judgment, acquired an available earning capacity, other than as common laborer.

Twelfth: Said Circuit Court of Appeals erred in failing to find that a substantial destruction of available earning capacity caused by injuries of a permanent nature would constitute a permanent and total disability.

Thirteenth: Said Circuit Court of Appeals erred in finding that the adoption of Bureau regulation No. 11 was

a reasonable definition of the term permanent and total disability, which was sanctioned by judicial authority.

Fourteenth: Said Circuit Court of Appeals erred in failing to find that plaintiff's total disability within the contemplation of the War Risk Insurance Contract was based upon conditions which were reasonably certain to continue throughout his life.

Fifteenth: Said Circuit Court of Appeals erred in finding that a reasonable interpretation of the term permanent and total disaibility would include the consideration of speculative occupational possibilities not available to the insured at the time of injury.

Sixteenth: Said Circuit Court of Appeals erred in failing to rule that a reasonable interpretation of the term permanent and total disability would not include the consideration of speculative occupational possibilities.

Seventeenth: Said Circuit Court of Appeals erred in finding the Court bound by Bureau regulations issued for the purpose of adjudicating claims under the contract of insurance.

Eighteenth: Said Circuit Court of Appeals erred in finding that plaintiff's total disability was not permanent and total within a reasonable conception of the term.

Nineteenth: Said Circuit Court of Appeals erred in failing to find that any ambiguity in the War Risk Insurance Contract as a whole should be strictly construed against the framers of the Contract.

Twenty: Said Circuit Court of Appeals erred in failing to find that a total disability caused by injuries or afflictions which were reasonably probable to continue throughout life was a permanent and total disability.

Twenty-one: Said Circuit Court of Appeals erred in finding that a total disability must be founded upon conditions which renders it reasonably certain that total disability will continue throughout the life of the person suffering from it before it can be permanent and total.

Twenty-two: Said Circuit Court of Appeals erred in failing to find that a total disability caused by an injury which was certain to continue throughout the life of the person suffering from it was a permanent and total disability.

Twenty-three: Said Circuit Court of Appeals erred in failing to rule that what would constitute a total disability in the original compensation act would likewise constitute a total disability in the War Risk Insurance Contract, and that the disability need only also be permanent to be permanent and total.

Twenty-four: Said Circuit Court of Appeals erred in finding that Congress had imposed upon the Director of the Bureau the power of ascertaining the conditions under which payments of insurance should be made or denied.

Twenty-five: Said Circuit Court of Appeals erred in failing to find that the Director of the Bureau had no power to alter the exact terms and conditions of the contract of insurance.

Twenty-six: Said Circuit Court of Appeals erred in finding that the Court's adjudication of the term permanent and total disability was bound by the subsequently enacted Congressional interpretation of the term defining permanent and total disability for compensation purposes.

Twenty-seven: Said Circuit Court of Appeals erred in justifying the War Risk Bureau's adjudication of petition-

er's claim for insurance, by subsequently enacted Congressional definitions of the term permanent and total disability for compensation purposes.

Twenty-eight: Said Circuit Court of Appeals erred in finding that the subsequent declaration of Congress defining permanent and total disability for compensation purposes was controlling in adjudicating petitioner's claim for permanent and total disability under the insurance contract.

Twenty-nine: Said Circuit Court of Appeals erred in finding that the lower court's adjudication of petitioner's claim for permanent and total disability was in conflict with subsequent declarations of Congress defining the term for compensation purposes.

Thirty: Said Circuit Court of Appeals erred in failing to find that petitioner's contract of insurance was yearly renewable term insurance and must be interpreted in the light of statutes in existence at the time of petitioner's injury.

Thirty-one: Said Circuit Court of Appeals erred in failing to rule that petitioner's rating of total disability should have been permanent and total and insurance payments made accordingly during his permanent and total disability.

Thirty-two: Said Circuit Court of Appeals erred in failing to rule that any regulations issued by the Director which altered the ordinary conception, and formerly adjudicated interpretation of the term was in excess of authority.

Thirty-three: Said Circuit Court of Appeals erred in finding that petitioner's contract of insurance was not an out and out contract.

Thirty-four: Said Circuit Court of Appeals erred in

ruling that the War Risk Bureau's regulation No. 11 was properly made by the Director.

Thirty-five: Said Circuit Court of Appeals erred in finding that the fact the petitioner was insured by the Government while engaged in hostile military service would in any way alter the generally accepted judicial interpretation and meaning of the terms used in the contract.

Thirty-six: Said Circuit Court of Appeals erred in failing to find that the fact the petitioner was insured by the Government while engaged in hostile military service would not in any way alter the generally accepted judicial interpretation of the terms used in the contract.

Thirty-seven: Said Circuit Court of Appeals erred in failing to find that the contract of insurance herein was a government undertaking to insure petitioner and as such was binding within the generally accepted judicial interpretation of the terms set forth in the insurance section of the War Risk Insurance Act, and within the Exact Terms and Conditions Published thereunder.

Thirty-eight: Said Circuit Court of Appeals erred in failing to find that what would constitute permanent and total disability within an accident insurance contract would also constitute a permanent and total disability within the War Risk Insurance Policy and in ruling that the interpretation of permanent and total disability adjudicating the term in accident policies was not controlling in adjudicating the like term used in the War Risk Insurance Contract.

Thirty-nine: Said Circuit Court of Appeals erred in finding that the nature of the consideration paid for insurance protection would materially alter the government undertaking and preclude recovery within the generally accepted adjudicated interpretation of the Contract.

Forty: Said Circuit Court of Appeals erred in failing to find that petitioner was insured for protection against the loss of earning capacity available to him at the time of entering into military service, and that the term permanent and total disability must be interpreted in the light of circumstances and occupational capabilities existing and available for earning capacity at the time of injury.

Forty-one: Said Circuit Court of Appeals erred in failing to interpret petitioner's contract of insurance in accordance with well established contractual principals, and in reversing the judgment of the Court below under a view that the government was not bound by the exact terms and conditions of the contract set forth in the original undertaking.

Forty-two: Said Circuit Court of Appeals erred in failing to find that petitioner had a Constitutional vested right to benefits purchased within the terms set forth in the War Risk Insurance Contract.

Forty-three: Said Circuit Court of Appeals erred in failing to protect petitioner's Constitutional rights to benefits purchased in the insurance contract against deprivation through administrative forces and influences.

Forty-four: Said Circuit Court of Appeals erred in reversing the judgment of the Court below for the reason that the said Circuit Court of Appeals was without jurisdiction to review the case.

Forty-five: Said Circuit Court of Appeals erred in failing to find that the judgment of the Court below was conclusive of petitioner's rights.

Forty-six: Said Circuit Court of Appeals erred in rendering judgment against plaintiff in error and in favor of said defendant in error for cost of suit.

Therefore, the said DeWitt T. Law, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of the United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, the judgment of the Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that judgment be entered affirming the decree of the United States District Court in the cause herein, and that the Court make such other orders as may be deemed necessary in affirming and re-enstating the judgment entry of the District Court, for the State of Montana, to the end that justice may be done in the premises.

DEWITT T. LAW,
Plaintiff in Person.

For the purpose of orderly discussion plaintiff will undertake as far as possible to group all assignments of error involving similar and kindred points of discussion in accordance to their relative sequence. When so arranged the second, seventh, with tenth and eleventh assignments of error are related to matters pertaining to the apparent reversal of facts indicated by the opinion of the Circuit Court of Appeals.

Quoting with reference to the opinion of the District Court below the Court of first instance finds that at the time of enlistment in the army plaintiff was of common schooling and of farm laborer vocation. (Transcript, page 134.) That plaintiff's injuries consisted of loss of left arm, loss of tissue to left leg, of at least 10 per cent vocational incapacity but that plaintiff appeared to be able to move with facility. The plaintiff's disabilities also consisted of: Neurasthenia and flat feet which latter two

injuries did not appear reasonably probable to be of permanent occupational disability. (Trans., pp. 134 and 135.)

The Court below also found that the Director of the Bureau had rated plaintiff temporarly totally disabled. (Transcript, p. 134.) And that it was not even suggested by the defense that plaintiff has a substantial earning capacity which upon its merits would serve demand and secure market.

The Circuit Court of Appeals sets forth the following facts in contravention with the finding of the opinion of the District Court:

That in the winter of 1916 and 1917 plaintiff was in school and continued his studies until the month of April, 1917. That he had taken a five months' course consisting of several months' bookkeeping and stenography and after discharge from the army completed his course in bookkeeping at the normal school in Kansas.

Characteristic of the opinion of the Circuit Court of Appeals throughout the Court makes no application of the foregoing findings of facts and fails to in any manner apply them to a definite principal or conclusion but since the Circuit Court has set forth their conclusion of facts, preparatory to the equally indefinite reversal of the judgment of the District Court below on generalizations of legal principals, the plaintiff will presume that the above finding had a material bearing to the ultimate conclusion of the Court.

When summarized the District Court below found plaintiff was of common schooling and of farm laborer vocation, and that the defense had not even suggested an earning capacity available to the defendant but in fact had them-

selves rated plaintiff totally disabled, while the Circuit Court of Appeals, through implications, states plaintiff was a bookkeeper.

In disposing of assignments of error No. 2-7, 9-10 and 11, it is submitted that finding of the Court below relative to plaintiff's occupational capacity relates to finding of facts only.

Finding of facts are not reviewable on writ of error:

> Distinguished from an appeal "A writ of error is a common law process and removes for examination nothing but the law. (Behene *vs.* Campell, 205 U. S. 407, 51. L. Ed. 87, Sydam *vs.* Williamson, 20 How 427, 15 L Ed. 978, Cohen *vs.* Virginia, 6 Wheat. 264, 5 L. Ed. 257, Hudson *vs.* Perker, 156 U. S. 286, 39 L. Ed. 427. Dawer *vs.* Richardson, 151 U. S. 658. Cotter *vs.* Alabama, 61 Fed. 747.) It has been defined as a commission by which the judges of one Court are authorized to examine a record upon which a judgment was given in another court, and upon examination to affirm or reverse the same according to law. (Cohen *vs.* Virginia, 6 Wheat 264-407.) An Appellate Court upon a writ of error has no right to revise the evidence in the Court below in order to ascertain whether the Court rightly interprets the evidence, or drew the right conclusion from it. (Hyde *vs.* Booream, 16 Pet. 167, 174. United States *vs.* King, 48 U. S. 865. Insurance Co. *vs.* Falsom, 85 U. S. 249. Dawes *vs.* Richardson, 151 U. S. 658. Nashville Nat. Int. Ry. *vs.* Bormum, 212 Fed. 634.) Zeline on Fed. appellate Jurisdiction and Procedure, Sec. 2, Page 2."

The extent of which the Circuit Court of Appeals has revised the evidence is shown by an examination of the transcript.

Testimony of DeWitt T. Law for plaintiff:

Direct Examination by Mr. Law.

"What was your occupation prior to the time you enlisted in the army?"

By Mr. Horton.

"Objected to as immaterial in this contract of insurance what his occupation was."

Overruled.

A. "At the time of enlisting in the army I was engaged in farm work. I, with the exception of the year 1913, I have never farmed for myself but I worked for other people on the farm, that is, a part of the time for my folks who were farmers. A great portion of the time, I went, followed up such work as harvesting, threshing, corn-husking and other work. I never engaged in work other than farming and farm work, general farm work, except very little in certain periods, and so forth, powder works during 1916, always manual labor of the commonest kind. At the time of my enlistment I had little less than ninth grade education, that is a little less than first year high school." Trans., pages ~~80-81~~. 72 - 73

Cross Examination by Mr. Horton.

"I was not a student at the Emporia Normal high school of Emporia during the winter of 1917-18, until my enlistment. No I was not, I quit. I ran out of work and I went to Emporia for about 3 months and then I quit school along in April. I did not enlist in the army for two or three months. I quit school and went to work, I think I began at the Emporia Normal school in February. I don't think I was there five months, I think I was there from February until the first of April. I wasn't taking any course—I wasn't taking a course in bookkeeping. I wasn't taking a course in anything, I just wanted to put in my time, I took some bookkeeping at Missouri at a school there. I went there about three months one fall, and then afterwards I worked. I finished working out the set of books so that I could get credit from the Emporia State Normal. I worked out the set of books and handed them in to them and they O. K.'d them. They just simply gave me a college credit on it. This bookkeeping course—there wasn't any course to it, that was after I was injured. I understand, I just simply worked out this

set of books from what little I knew and they very kindly gave me the credit on it." —54

The attention of the Court is called to the affect of the revisal of the evidence when compared with the actual transcript. In the Court below the attorney for the defendant apparently was undertaking to establish that plaintiff might have undertaken an occupation as bookkeeper or theoretically had such qualifications. The evidence shows that some fall preceding 1916-17 plaintiff had attempted to qualify himself to follow such occupation. This attempt, however, was abandoned and the testimony shows that prior to enlistment plaintiff had never followed an occupation other than as common laborer. But then in further cross-examination it is brought out that following plaintiff's discharge plaintiff worked out a set of books from the knowledge previously acquired during his attendance of the Missouri school. In passing upon this testimony the Circuit Court of Appeals revises this testimony and, in direct contrast with the testimony that there was no course in bookkeeping at the Emporia State Normal, and finds that plaintiff had subsequently to his military service completed his course in bookkeeping at the Emporia State Normal and this even though the cross examination of the defense affirmatively shows that the bookkeeping credit from the Emporia State Normal was simply a matter of submitting a set of books for a credit. Cannot one acquire a credit in bookkeeping without completing the course? In law a course at the University of Montana consists of 127 credits; just what credit requirements for the completion of a bookkeeping course is not known to the plaintiff. However, the finding of the Circuit Court of Appeals that plaintiff had completed a course in bookkeeping at Emporia or elsewhere, is with-

out foundation. Furthermore the Circuit Court of Appeals disregarded other material testimony, set forth in the transcript. The attention of the Court is called to the etstimony of C. Leaphart, dean of the Law School, University of Montana.

Testifying in behalf of the plaintiff, appearing in person, Dean Leaphart after testifying that he had observed plaintiff's handwriting, testifies:

> "I will you state the nature of my writing—that is, is it such that—"
>
> *By Mr. Horton.*
>
> "Objected to unless we know what the purpose of this line of examination is."
>
> *By the Court.*
>
> "What is the object?"
>
> *By Mr. Law.*
>
> "The object is to show that as a matter of fact that my hand-writing is such that it would preclude me from engaging in any clerical work or anything in the nature of written work."
>
> *By the Court.*
>
> "Well he may answer; if it is not material and not entitled to consideration the Court will give it none."
>
> A. "It is almost indecipherable. It is extremely difficult to read his examination papers." Tr. p. 66

It is submitted that a person whose handwriting is almost indecipherable, would, as bookkeeper, become an outcast and that the attempt of the Circuit Court of Appeals to constitute a course in bookkeeping out of a mere credit entry further fails for the reason that the court's theoretical qualifications could not under the foregoing circumstances have any practical applications.

The contract of war risk insurance was a government undertaking to provide a measure of protection to men injured in military service should they become permanently

and totally disabled and as such must be given a practical construction which would afford the stipulated protection to each man insured. Assignments of error 4-5-7-8-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43.

Preparatory to a discussion of the above assignments of error the attention of the Court is called to the circumstances under which the insurance contract was subscribed. In 1917 men were called upon to offer their services to a public cause which in the law of average predestined a fate of total and permanent industrial incapacitation to many of their number. The men insured were selected from the common walks of life and while a few of their number were men who had enjoyed educational advantages the masses of their numbers, like the plaintiff, were men who had no means of livelihood other than manual labor. They were men called from the farms, from the factories and other varieties of vocations. These, Your Honor, were the men who the government was undertaking and offered to insure against a permanent and total disability. The government knew that in the law of average numbers of these men would return from the war no longer able to follow an occupation, and those were the circumstances upon which the government was legislating when offering to insure men in military service. Protection to men who should become injured in military service was the ultimate aim of Congress, but under these conditions what individuals were protected under the war risk insurance act? Is the contract to be interpreted to afford protection to only the few who had acquired educational advantages, or is the contract and the term permanent and total disability to be given an interpretation

which will afford the stipulated protection to a layman who had been called upon to offer his services to a public cause? Is the contract and term permanent and total disability as used in the law of Congress authorizing the act to be given a practical construction so as to afford protection to each individual discharged from the army should he find his earning capacity destroyed and find himself permanently and totally disabled from following an occupation available to him, or is the government to forget the circumstances under which the contract was issued and the promise both implied and expressed in the insurance contract which Congress had authorized and published and say, "Well, you are uneducated and your experience is limited but it might happen that at some future time the defects in your education might be corrected and an uncontemplated experience acquired, so while we admit you totally disabled you are only temporarily totally disabled and no insurance is due you?" These, Your Honors, are issues on the merits of this case.

The contract of insurance in both adjudicated principals of construction and by the express terms of the contract provides for a protection available to men who find themselves permanently incapacitated from following an occupation which they are capable of following.

The contract of insurance herein constructed came into existence through statutory authority, authorizing the contract:

This original bill was referred to the Committee on Interstate and Foreign Commerce on August 10, 1917. Hearings were commenced on August 11th and on August 30th the committee reported the bill with various changes (House

Report 130, Parts I, II and III, Congressional Record, 65th Congress, Vol. 55, Part VII, pages 6708-6713). Mr. Rayburn, of the committee, had charge of the bill and submitted the report of the majority. He says (House Report 130, Part I, page 6708):

"This insurance is to be sold to the soldiers at normal rates at actual cost which he would pay if he were not a soldier. In this way he cannot only secure insurance from the government but can secure it at a proper rate. Existing insurance companies charge prohibitive rates for war risks. While they recognize $8 a thousand as a normal rate for a man 21 years old, they add an additional $50 a thousand for a war risk, making the lowest rate for a soldier by private insurance $58 a thousand. In the next place it is *term insurance, which ends with the period unless renewed, but may be renewed at the option of the soldier until the end of the war, when it may be converted into some other form of insurance.* This is provided for because the soldier may be considerably older at the end of the war, his health may be impaired, and if so it would be difficult and expensive for him to secure insurance from a private company. We feel that it is right for the government to make restitution, as far as possible, *by giving him the same benefits as to insurance which he would have enjoyed if he had never served his country in the war.* An advantage to the soldiers and their families carried by this bill is that the benefits to be paid *are not to be paid in a lump sum,* to be squandered or lost in unfortunate investment, *but will be paid in installments so as to afford the greatest benefits.*

"Another valuable feature of the bill is that if during the first 120 days after enlistment the soldier should fail to take insurance, and die, he will be considered as insured and the benefits of such insurance will go to his family. Your committee thinks this bill wise and beneficient in all its features, and though a radical departure in some respects, thinks it will prove a great blessing to our soldiers and their families and be very satisfactory to the country.

"The first, second and third features provide for the maintenance of the families of the soldiers during service and for compensation in case of death, and it is believed this is effected much more satisfactorily in this bill than in the existing pension system and will not be so expensive in the long run. The elements of certainty and security afford an incentive to the soldier to go forward confident of protection by the government to themselves and their families and go far to mitigate the anguish of the families themselves during the unhappy separation from the soldiers."

He says further (House Report 130, Part III, page 6709):

"Any young man physically fit to enter the army *can protect himself and his family,* present or future, by *insurance against death or total disability,* but if he enters the army by this very patriotic service he is deprived for all practical purposes of this right, inasmuch as the additional rates ranging from $37.50 to $100 per thousand, that private companies charge, are absolutely prohibitive. Purely as a matter of justice the government should make this loss good *by compensation in kind; that is, by issuing its own insurance. This, however, is but one of many justifications for article 4 of this bill.*

While the government can fairly give only a minimum of compensation based upon general conditions throughout the land, it must recognize that men ought not to be content with this minimum; that they ought with true American foresight and self-reliance, to procure additional protection for themselves and their families in case they become disabled or die through injuries received in the service.

* * * * * * *

"We shall preserve American ideals and sustain the self-respect of our fighting youth if we offer them in place of either present or future gratuities a real opportunity to purchase for themselves the protection that they may deem essential for their families. *But this protection must be real; it must cover death*

or disability at any time, not merely within five years after the war. The insurance must mature, if the insured so desires, when he reaches a certain age, *as well as by death or total disability.*

* * * * * * *

In a general outline or explanation of the bill by Senator Williams, who had charge of the bill on the floor of the Senate, the following language was used (Cong. Rec. Vol. 55, Part VIII, Oct. 3, 1917, p. 7690):

"The reason that guided us was this: The man is summoned to the colors by his country. The drafted man goes because he must go. The government creates the war, not the soldier. *The war hazard, therefore, is the creation of the government.* Of course, the volunteer ought not to be put upon any lower ground than the drafted man. *Now, we thought the government ought to bear that part of the insurance risk which the government created,* and we thought we ought to make the soldier bear that part which in ordinary peace times he would have had to bear if he had taken out insurance. We therefore charge him just that net premium, which is $8 in the case I have mentioned. *Then the Government bears the war risk and it also bears the overhead charge. It is fair that the Government having deprived a man of his insurability, should put him at least in status quo ante bellum with regard to insurability, and that is what this bill does.*

First, then, we have limited the beneficiaries; second, we have limited the amount; third, we have limited the insured to the service; fourth, we have made the policy nonassignable and fifth, we have exempted it from debts and execution. *To these limited extents we have gone into the insurance business, but no farther;* and, as far as we have gone, we have simply done that which every government from the beginning of the earth ought to have been doing.

The War Risk insurance act as adopted by Congress was divided into four main Articles. Article I of the act provides for marine insurance for the protection of foreign

commercial enterprises during the war, and by Section five Article I further provides disability insurance for the benefit of the men manning vessels engaged in commerce, U. S. Compiled Stat 1919 anno. 514cc, but Sec. 12 of this article provides that Sections 2 to 7 inclusive and Section 9 shall be construed to refer only to the division of marine and seamen's insurance. 40 Stat 398, U. S. Compiled Stat 1916, 1919 Supp. 514k.

Article II of the War Risk Insurance act provides for family allotments to be made by the men for the support of their families and for allowances to be paid by the government. Article III of the act provides for compensation to be paid by the government to men injured in military services, and Article IV of the act authorizes the insurance contract in question.

The Preamble to Article IV of the act states:

> "In order to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corp when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Art. III the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payments of premiums as hereinafter provided." 40 Stat. 409. U. S. Compiled Statutes 1916, 1919 Supplement, 514 U.

Congress then proceeded to provide for the exact terms and conditions of the contract.

> "TERMS AND CONDITIONS OF THE CONTRACT; BENEFICIARIES. The director subject to the general directions of the secretary of treasurer, shall determine upon and publish the FULL AND

EXACT TERMS AND CONDITIONS OF SUCH CONTRACT OF INSURANCE. The insurance shall be payable only to a spouse, child, grandchild, parent, brother or sister and also DURING THE PERMANENT AND TOTAL DISABILITY OF THE INJURED PERSON OR TO ANY OR ALL OF THEM. The insurance shall be payable in two hundred and forty equal monthly installments. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings and such other provisions for the PROTECTION AND ADVANTAGE OF AND FOR THE ALTERNATE BENEFITS TO THE INSURED AND THE BENEFICIARIES MAY BE PROVIDED for in contract of insurance, or from time to time by regulations." 40 Stat. 409, 615 U. S. Compiled Stat. 1916, 1919 Supp. 514 uuu.

"During the period of the war and thereafter until converted the insurance shall be term insurance for successive terms of one year each." 40 Stat. 410 U. S. Compiled Stat. 514vv.

The above statutes are all enacted under Art. IV of the War Risk Insurance act and have application only to the contract of insurance which Congress was contemplating as a protection in addition to the compensation provisions of Art. III of the act. When summarized the above statutes provides for the issuance of the contract in multiples stated. Congress then provides what will constitute the terms and conditions of the contract generally and further provides that the director of the bureau shall determine upon and publish THE FULL AND EXACT TERMS AND CONDITIONS of such contract of insurance. After the exact terms and conditions of the contract are determined upon and published Congress provided that the director of the bureau might in his discretion adopt regulations for the ALTERNATE BENEFIT OF

THE INSURED AND THE BENEFICIARIES UNDER THE CONTRACT. Then it is provided by 40 stat. 410 that the insurance contract shall be issued for terms of one year each; but it is submitted that the statutes in no manner authorizes any regulations which would alter the exact terms and conditions of the contract to the detriment of the insured, to the contrary the regulations authorized are limited to regulations for the benefits to the insured and his beneficiaries.

Power of the director is again limited in the creation of the bureau.

> "The director subject to the general directions of the secretary of treasury, shall administer, execute, and enforce the provisions of this act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of the act and shall decide all questions under the act . . . . Except that in event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States. 40 Stat. 399, 555 U. S. Compiled Stat. 1916-1919 Supp. 514kk.

It is submitted that the foregoing sections both define and limit the power created by Congress. In the first instance the director is authorized to publish the full and exact terms and conditions of the contract within the limitations stated. Among other provisions the insurance was to become payable "During the permanent and total disability of the injured person" then supplementary to the publication of the exact terms and conditions it was provided that the director may issue regulations by way of limitations specified as regulations for the "alternative benefits to the insured and the beneficiaries." The gen-

eral powers of the director applicable to the entire War Risk Insuranc act set out in 40 Stat. 399 above, again limits the power of the director to the issuance of regulations for the purpose administering the provisions of the act, and by way of restrictions specifies that regulations shall not be inconsistent with its provisions.

The full and exact terms and conditions of the contract of insurance published as above provided stipulates:

> "That the insurance has been granted will be evidenced by a policy or policies issued by the bureau which shall be in the following general form, (which may be changed by the bureau from time to time provided that full and exact terms and conditions thereof shall not be altered thereby)." Plaintiffs Exhibit A. Transcript page 17 /)

Under the exact terms and conditions published the insurance contract herein provided for insurance in the amount of $10,000

> "converted into monthly installments of $57.50 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ per cent per annum payable."
>
> "To the insured, if he, she, while the insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability." Trans. p 18/0

The District Court in passing upon the contract of insurance from statutory construction holds:

> "In any case when earning ability or capacity is destroyed to an extent that no substantial portion remains on its merits to serve, demand, and secure market, there is total disability; and if it be reasonably probable that this status will long continue, is not temporary, the disability is total and permanent in legal contemplation and within the intent and meaning of Art. IV of the act. And that status once determined, it will be presumed to exist so far

as insurance is due it, until the end of totality or permancy is a proven fact." Trans. p. ~~130.~~ 72 – 73

The District Court below also found that the insurance was industrial, not occupational and upon the premises finds plaintiff permanently and totally disabled.

"The insurance like enlistment extends to all soldiers, of infinite diversity of ability and variety of vocation. It is to compensate them for earning capacity destroyed, the earning capacity the soldier had before its destruction.

"In determining as a question of fact the extent of the destruction and consequent disability, the inquiry is not to be restricted to the vocation the soldier may have followed, but extends to any other gainful vocation that it is reasonably probable he can follow with reasonable effort and success.

"The soldier's capacity or ability to earn, and not merely the vocation in which he has earned, is the test of disability." Opin. of the Court Trans. p ~~138.~~ 72

"In view of the premises it is believed and found that by a and in consequence of the injuries received in service, plaintiff then was and yet is totally permanently disabled within the intent and meaning of Art. IV of the act. It is not even suggested by the defense that he has substantial earning capacity that on its merits and not favored by quasi charity would serve, demand and secure market." Opin. of the Court Trans. p ~~141.~~ 74

"As the latter is to be paid only 'during permanent and total disability,' if and when the plaintiff's ambition, industry, developed ability and preseverance create new earning capacity as a lawyer, insurance payments to him will no longer be due, and that however slowly business is secured for exercise of the new capacity, however longer is his and the usual apprenticeship in practice of more economy than law, the event is yet 'on the knees of the Gods,' and impairs not his past and present right to insurance." 75 & 76

To the above the defendants grievously, peevishly, and evasively assigned error only that the Court had

erred in finding that plaintiff was permanently and totally disabled because of his disability impairment from following his occupation as a farmer. Trans. p 147, assignment of error 9, and that the Court had erred in holding that it is not even suggested by the defense that the plaintiff has substantial earning capacity that on its merits and not favored by quasi charity would serve demand and secure market, the defendant not being allowed by ruling of the Court to introduce testimony after submitting its motion for judgment. Assignment of error 13, Trans. p 148.

Were it error for the Court to rule that defendants could not submit evidence after electing to submit their case for judgment would this error suggest an earning capacity available to the plaintiff? And wherein does the District Court hold that plaintiff was permanently and totally disabled because of his incapacitation as a farmer? To the contrary the express holding of the District Court was that the inquiry was not restricted to any particular occupation.

The District Court holds that plaintiff's insurance payments were due under statutory construction "during plaintiff's actual permanent and total disability." The full and exact terms and conditions of plaintiff's contract of insurance specifies that insurance is to become payable commencing with the insured's permanent and total disability and to continue during such disability. That plaintiff's disability was total is a finding of the Court on question of fact, ordinarily for the jury, which finding is supported by the director's previous award adjudging plaintiff totally disabled; that plaintiff's disabilities upon which the judgment was based are permanent is beyond controversy. It

is submitted that the finding of the District Court is easily within the stipulated term of the full and exact terms and conditions of the contract.

The opinion of the Circuit Court of Appeals is silent on the foregoing, and in reversing the District Court's on the above comments only:

> "Total permanent disability must exist in order to make the greater protection available. Whether such a condition exists must depend upon facts presented by the insured. It would be practically impossible to lay down a hard and fast rule; indeed, obviously it might be unjust to attempt to do so. Common knowledge tells us that in one person, as, for instance in a frail, delicate body, a condition of permanent total disability may exist as the direct result of a certain physical condition, while in a vigorous, strong body almost exactly similar condition might produce but partial and temporary disability, what is total and permanent disability is not merely the inability to pursue the calling which the claimant followed before his disability. The statute fixes no criterion with respect to any one calling but takes up the physical conditions and facts of each case. Of course no interpretation which is against reasonable common sense can be sustained." Opinion of the Circuit Court of Appeals. Trans., p. 84.

Noticeably, thus far the Circuit Court of Appeals finds no fault in the opinion of the Court below, and so far as the Circuit Court expressed itself the two opinions are in full accord. In the trend of the opinions, however it is apparent that the District Court definitely commits itself, passes upon the case before the Court, and in the end reaches a conclusion through statutory construction and the application of common sense principals which it is submitted is in entire conformity to the exact terms and conditions under which insurance benefits were stipulated to be paid.

The trend of the opinion of the Circuit Court of Ap-

peals, it is submitted, is otherwise. After revising the evidence preparatory to a reversal on questions of facts the Circuit Court appears to abandon this point of attack with the following comments:

> "Inasmuch as the District Court found that it does not appear reasonably probable that the flat feet and nervous condition complained are permanent disabilities, we can eliminate those two matters in considering the question whether the plaintiff was permanently and totally disabled within the meaning of the War Risk Insurance Act and acts supplemental thereto." Trans., p. 83.

No fault to the above is urged, except to the implication that plaintiff's contract of insurance covenated within Art. IV of the War Risk Insurance Act is to be amended by acts supplemental thereto but the Circuit Court in disregarding the disabilities found by the Court below not to be of permanent occupational incapacitation also eliminated the disabilities which the Court below had found constituted a permanent and total disability within the War Risk Insurance Contract, and makes no further references to the disability claim before the Court.

By way of generalization the Circuit then commits itself that a man of frail and delicate body would become permanently and totally disabled by a disability which would constitute but a partial and temporary disability to a strong and vigorous body. This can be admitted as a true maxium but the plaintiff is not frail and has never been accused of being delicate nor were the men engaged in military service in the recent war so constituted so the foregoing comments are mere dicta to plaintiff's case, and except to the frail and delicate men of military service has no application to War Risk Insurance Contracts gen-

erally. In further justification the Circuit Court of Appeals commits itself that "no interpretation which is against reasonable common sense can be sustained. This, too, need not be controverted but what would the Circuit Court of Appeals consider a common sense interpretation of the term permanent and total disability? Here again the opinion of the Circuit Court is silent and with the foregoing comments again appears to abandon this point of attack on the interpretation given the term through the reasoning of the Court below. By the foregoing dicta the Circuit Court impliedly reverses the decision in the Court below, but it is submitted that a reversal substantiated by nothing but the Court's creative dicta on the case is compatible with neither law nor justice.

The finding of plaintiff's permanent and total disability by the District Court is supported by unanimous authority adjudicating likes and similar contracts for disability indemnities.

The rules of construction interpreting contract against the maker is especially applicable to insurance contract where the men drafting the contract presumably are capable of discerning the meaning of the language used.

> "Such language should be construed most favorable toward those against whom they are meant to operate." (Ind. Mut. Ind. Co. *vs.* Hawkins, 29 L. R. A. (N. S.) 637.) "A construction will not be adopted which will defeat recovery if it is susceptible of a meaning which will permit one." (Bro. Loc. Eng. *vs.* Aday, 34 L. R. A. (N. S.) 128.)

In the contract before the Court it is true we are interpreting the contract made under government statute but this in no way alters the construction of the terms contained

within the insurance policy and this contract should be interpreted according to the rules of construction applicable to contracts with individuals or corporations.

Petitioner offers the following authorities as sustaining this point:

"1. The supplementary agreement is signed by General Butler, and not by plaintiff. Its doubtful expressions should, therefore, according to a well known rule, be construed most strongly against the party who uses the language."

Garrison *vs.* U. S., 7 Wall 688, p. 278.

"The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon."

U. S. *vs.* Bostwick, 94 U. S., 53, p. 66.

"It is a well-established principle that, when there is a doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear. Cases cited."

Scully *vs.* U. S., 197 Fed., p. 343.

"The findings of fact and conclusions of law by the learned judge who tried this case below clearly present the points involved in this controversy. The findings of fact are supported by the evidence, and we are therefore not inclined to interfere with the same. The rule that a contract is to be construed most strongly against the party preparing it is well settled, and applies to the government in a case like this as well as to an individual. In the case of Garrison *vs.* U. S. 7 Wall. 688, 19 L. Ed. 277, the Court, among other things, said:

" 'The supplementary agreement is signed by Gen. Butler and not by the plaintiff. Its doubtful expres-

sion should, therefore, according to the well settled rule, be construed against the party who uses the language.' ''
U. S. *vs.* Newport News Ship Bldg. Co., 178 Fed., p. 200.

An early case reported in Hutchinson *vs* Supreme Tent, 22 N. Y., Supplement 802, passing upon the question as to whether the loss of the fingers to a hand came within the clause permanent and total disability, holds:

> '' 'There is no question that his injury was permanent, it would have been permanent had he but lost the end of but one finger at the first joint,' and in language universally quoted with approval in subsequent adjudication the Court continues, 'Total disability is ordinarily one of fact and is for the jury. It must be determined from the facts and circumstances disclosed in each case. That which would be total disability in one case might not be in another. The loss of a hand to a lawyer might interfere but slightly in the transaction of his business or in the performance of his work, while to a man who had learned a particular trade by which he had always earned a living and was entirely ignorant of all other trades or businesses, it might prove to be a much more serious disability.' ''
>
> Hutchinson *vs.* Supreme Tent, 32, N. Y., Supplement 802.

In the case of Indiana Life Endowment Company *vs.* Reed, 103 N. E. 83, the injured man was insured under a contract, providing indemnity should the insured become totally and permanently disabled from performing any and all kinds of manual labor or business upon which he may depend for a livelihood. The insured was injured, necessitating the amputation of his arm at the wrist. By vocation insured was a farmer.

> "What is permanent and total disability within the meaning of this policy? * * * * * (10) Such a contract is to be reasonably construed so as to effectuate the purpose for which it was made. A fair and reasonable construction should be given to all the lan-

guage employed, and in so doing we should consider the relation and situation of the parties, when the policy was issued, and ascertain the meaning upon which the minds of the contracting parties may reasonably be said to have met at that time (List of cases.)

"(11) When so construed, the policy issued to appellee means that, in case the insured becomes totally and permanently disabled from following any occupation or engaging in any business from which he may by reasonable effort obtain a livelihood, he is entitled to payment as stipulated in the policy. Such employment or business is not necessarily limited to farming and coal mining, but, on the other hand, the policy must be construed in the light of the facts that must have been known to both the contracting parties when it was issued. The company insured appellee knowing that he was an illiterate laborer. So, taking the man as he was when the policy was issued, and the claim for benefits presented, if from the injury and condition shown he was totally and permanently incapacitated from earning a livelihood, the company could not rightfully refuse to pay, because of a mere possibility that by education or otherwise he might at some time become able to earn a living in some way or by some means not then available. Appellee would not necessarily be entitled to recover because of the loss of his hand, for the policy only gives him such right for total and permanent disability. The loss of one hand might or might not result in such disability.

"(12) Whether he was or was not totally and permanently disabled within the meaning of the policy as above construed, considering all the evidence bearing on the question of fact to be determined by the court or jury trying the case. (List of cases.)"

Indiana Life Endowment Company *vs.* Reed, 103 N. E. 83.

The attention of the Court is called to the opinion below:

"In determining as a question of fact the extent of the destruction and consequent disability, the inquiry is not to be restricted to the vocation the soldier may have followed, but extends to any other gainful vocation

that it is reasonably probable he can follow with reasonable effort and success.

"The soldier's capacity or ability to earn, and not merely the vocation in which he has earned, is the test of disability.

"A tea-taster or singer or the like might suffer total permanent destruction of his special talent without just claim to any disability, for that he has capacity to successfully follow a multitude of other gainful occupations; or he might suffer like destruction of a hand, foot, eye, with like consequence, for that his earning capacity as a tea-taster, singer or the like is unaffected.

"On the other hand, a common laborer suffering like destruction of his ability for manual toil, might have no other ability or capacity to earn, and so be justly rated of total permanent disability, despite speculation and conjecture that he might become a tea-taster, lawyer, doctor, artist, author or philosopher and of greater earning capacity than before, and despite however willing he be to make the effort." (Tr. of Record, pp. ~~138-139.~~ 72.

In the case of Keith *vs.* C. B. & Q. Railroad Co., 116 N. W. 958, the insured had taken out an indemnity policy insuring members against physical inability to do any work. The insured was disabled to an extent which precluded him from engaging in railroad work or any similar occupation, although he was subsequently able to hold a gratuitous position as a bartender at a small wage. The Court in that case rendered the following opinion:

"If an injured member of the Relief Department recovers to the extent that he is no longer disabled in the performance of the work contemplated or similar work—that is, employment equally as desirable and remunerative—then the obligation of the defendants to pay disability benefits ceases. The work *contemplated* is the work of railway employees. The purpose of the department is to partially indemnify its members against the loss of wages occasioned by their inability

to perform such labor. In other words, the 'disability' for which partial indemnity is paid is the disability which prevents the member from doing the 'work' *contemplated* in the contract, and which results in his financial loss." * * * * * "In the opinion overruling the motion for rehearing, it is said: 'There seems to be force in the argument that if the plaintiff had recovered from the injury so as to be able to perform labor *similar and equivalent* to that required in the employment in which he was engaged at the time of the accident or was able to perform the duties of an engagement that was open and available to him whereby he could support and maintain himself as he was able to do before the accident, he was able to work within the meaning of that expression in the contract.' This is a correct rule and should be adhered to whenever applicable. Defendants invoke it here. It follows, of course, that the instruction given herein was erroneous, in that it defined 'disability' as 'inability to perform the ordinary duties in the employment in which Keith was engaged at the time of his injuries.' But, as we view it, this error was without prejudice. Under the evidence the judgment rendered was the only one permissible. Keith never became physically able to resume his work as a switchman; nor did he ever become physically able to earn wages in any *similar employment;* nor was he ever able to earn wages equal to the wages of a switchman. He was retained as a bartender notwithstanding his physical defects, which partially incapacitated him. A review of the evidence leads us to the conclusion that he was able to hold this position by reason of his employer's indulgence, and, further, because of a tenacity of purpose on his part to earn what he could in spite of his impaired physical condition."

Keith *vs.* C. B. & Q. Railroad Co., 116 N. W. 958, 23 L. R. A. (N. S.) 3562.

In the case of Brotherhood of Locomotive Engineers *vs.* Aday, 134 S. W. 928, the indemnity contract provided payment for permanent and total disability incapacitating the

injured person from performing all manual labor. The insured suffered a partial paralysis of the left hand which necessitated the retirement from all railroad work, although claimant was able to work some in a pool hall. Quoting from the opinion of the Court:

> "The purpose of the Brotherhood, and the object of the contract, was to protect the beneficiary from the loss of time and wages caused by disease and injury, and provide a fund for his support if the injury 'totally and permanently disabled him from the performance of all manual labor,' in other words, from earning a livelihood. 'Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business' et. Ker on Insurance, 385, 386; 4 Joyce on Insurance, 3031. Our Court said in Industrial Mut. Ind. Co. *vs.* Hawkins, *supra,* 'Total disability is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case. It must depend largely upon the occupation and employment and the capabilities of the person injured.'
>
> "The testimony shows that appellant was a locomotive fireman and engaged in the railroad service. * * * * * It is evidently the intention of the parties to protect the beneficiary and permit him to recover the full amount of his certificate upon the occurrence of any one of the causes specified when it permanently and entirely incapacitated him from all service of any kind whatever in the railroad employment."

Brotherhood of Loc. Eng. *vs.* Aday, 134 S. W. 928, 35 L. R. A. (N. S.) 29.

In the case of Industrial Mut. I. Co. *vs.* Hawkins, 127 S. W. 457, where the insured was to recover indemnity

should he be wholly disabled and prevented from the prosecution of any and every kind of business, the Court renders the following opinion:

> "*That construction should be given to the language which would not make it inoperative from its very inception, but which would, if at all consistent with the words employed, make an effective undertaking.* In the case at bar the total disability occurred when the insured was prevented by the injury 'from the prosecution of any and every kind of business.' The use of the word 'prosecution' indicates that the parties intended to mean that the insured was wholly disabled from doing that business which he had the capabilities to prosecute. Otherwise, he could not recover unless he sustained an injury that rendered him absolutely helpless, both mentally and physically. The plaintiff was an uneducated day laborer. He had no ability to do any business of any kind except that of manual work. He could not practice law or medicine, or perform the duties of a banker or bookkeeper. He did not have the ability to follow these lines of business; and yet he was not so totally disabled that he could not follow these avocations if he had possessed the ability to do so. It is, in effect, contended by defendant that by the terms of the contract he could theoretically, if not practically, do some kind of business, and therefore he cannot recover. Such a construction of the contract would virtually make it ineffective for any purpose at its very execution. Under such an interpretation, the insured would scarcely, if ever, be entitled to indemnity. For that protection he was making stated payments and the defendant received such payments. It was manifestly the intention of the parties that he should receive indemnity when he was so injured that he was wholly and totally disabled and prevented from the prosecution of any business which he was able to do or capable to engage in; and we think that this interpretation of the contract is not inconsistent with the above provision, defining the nature of the disability as contemplated by the policy. We conclude that this is the

reasonable and proper construction of the provision of the contract involved in this case."

Ind Mut. I. Co. *vs.* Hawkins, 127 S. W. 457, reported with notes, 29 L. R. A. (N. S.) 637.

Since the statutes authorizing the contract provides insurance is to be payable during a permanent and total disability and the exact terms and conditions of the contract specifies that insurance was to become payable commencing with permanent and total disability and continue during such disability, and since all authorities unanimously limits the occupations or earning capacity contemplated to an earning available to the insured at the time of entering into the contract the foregoing would seem to dispose of the case before the court, so far as honesty and justice is concerned. But now we must refute the power of the Veterans' Bureau to dishonestly defeat the obligation under the contract by specifying different and more stringent conditions under which insurance is to be paid.

The defendants here rely upon an appendix to the contract promulgated after the full and exact terms and conditions of the contract were published, after the contract herein was covenated. If the different and more stringent conditions imposed are to be given effect it must follow that no contract was ever in fact made by the government for it is established law that in order to covenant a contract there must be a meeting of minds on definite objects. In this instance the government undertook to make the stipulated payments of insurance should the insured become disabled within a definite physical status set forth in the full and exact terms and conditions of the contract. Obviously there could have been no meeting of minds on any other terms than those set forth and expressed in the orig-

inal undertaking, and if plaintiff was not insured within the terms stipulated, he was not insured at all. The government merely falsely pretended to sell the stipulated protections and collected the insurance premiums under false representations that we were to be protected within the stipulated terms. The attention of the Court is again called to the expression of the Circuit Court of Appeals:

Court Opinion.

"We have considered the cited cases which involve the interpretation of accident insurance contracts. They are not controlling, for War Risk Insurance is of a materially different character, being in large part based upon considerations other than those which enter into a purely business relationship of accident indemnity contracts. The distinction has been recognized by the Comptroller of the Treasury, who has pointed out that War Risk Insurance established by the statute is not an out and out contract of insurance on an ordinary business basis, nor yet a pension, but that 'It partakes of the nature of both.' (Decision of Comptroller, July 5, 1919; Casorello *vs.* United States, 271 Fed. 468.)" Trans., p. 8-1.

If the contract herein was not an "out and out" contract it was no contract at all, for how could an undertaking, or obligation be a contractual obligation, and yet not be an "out and out" contractual obligation? But here again the opinion of the Circuit Court of Appeals is silent and cites only the opinion of the Comptroller of the Treasury, who as a party to the dishonest attempt to repudiate the government undertaking issued the appendix to the contract changing the definitions of the term permanent and total disability stipulated in the full and exact terms and conditions as authorizing payments of insurance benefits to commence with a permanent and total disability and continue during such disability to the terms subse-

quently issued by the Comptroller of the Treasury and adopted by the Director of the Bureau stipulating as follows:

> Treasury Department,
> *Bureau of War Risk Insurance,*
> Washington, D. C., March 9th, 1918.
>
> "By virtue of the authority conferred in section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term 'total disability' and the determination as to when total disability shall be deemed permanent:
>
> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantial gainful occupation shall be deemed in Articles III and IV to be total disability."
>
> "Total disability shall be deemed to be 'permanent' whenever it (total disability) is founded upon conditions which render it reasonably certain that it (total disability) will continue through the life of the person suffering from it (total disability)."

Cleverly as the foregoing is worded the drastic effect of the definition is none the less obvious. In the first instance the Director disregards the conjunctive form of the term "permanent and total disability" and stipulates that insurance, which under the contract was to become payable commencing with permanent and total disability and continue during such disability, is to become payable for a "permanent total disability" and the new term of "permanent total disability" must be literally construed with every presumption against the insurance claimant. It must be impossible for the claimant to follow a gainful occupation, his chances of finding an occupation available to him might not be one in a thousand but still it is possible that he might find such an occupation and he fails to become totally disabled, and then such impossibility of finding a gainful occupation must be based upon conditions which are certain

to continue through life, his chance of recovery again might not be one in a hundred, yet still he might recover to an extent which wuold render it possible for him to follow a gainful occupation and he fails to satisfy the Director's stipulation for certainty, or his impossibility to follow a gainful occupation may not be founded upon conditions which render it certain that the insurance claimant could not rehabilitate himself through education to an extent which would render it possible that he might some time be able to follow a gainful occupation, and he again fails to satisfy the Director's stipulation for certainty; so under the new conditions legislated by the Director of the Bureau the insurance becomes payable only whenever it becomes certain that the insured might not by any chance ever be able to continuously follow a gainful occupation in contrast with the original terms "of the contract providing that the insurance was to become payable commencing with a permanent and total disability and continuing during such disability," nor does the fact that the Director seeks to appear reasonable by annexing the word "reasonably" materially alter the drastic effect of the term used as all words are presumed to merit a reasonable application according to their general usage and whether expressed or not the word certainly would be deemed to have a reasonable application without inserting the qualification already implied. The Director might further rationalize his definition by qualifying the word certain to what was reasonably, "reasonably certain" but in each instance a moderate rational conception of what was certain would be implied.

In passing upon the above regulation promulgated by the Director the lower Court comments:

"His attempt in that direction by the regulation aforesaid, taken literally, is more extreme and destructive of the spirit of the act, if possible, than either of those rejected by Congress as aforesaid.

"For he stipulates for the 'impossible' and for the 'certain' neither of which is a reasonable standard, exists but rarely in disputed facts, has any place in judicial determination."

But the Circuit Court of Appeals in reversing the lower Court held:

"In adopting such a definition the Director exercised power conferred by statute, Congress imposing upon him the duty of ascertaining conditions under which payments of insurance should be made or denied."

And then the Circuit Court of Appeals further comments:

Opinion of the Court.

"A liberal construction of the statute should be adopted, but, of course, the courts are always bound by the limitations of the statute and by regulations properly made by the Director, pursuant to the authority conferred by the law." (Holmholz *vs.* Norst, 294 Fed. 417.)

The Circuit Court of Appeals reverses the decision below stating "a liberal construction should be adopted." Then why was the rule of construction not applied in this instance? Is it a liberal construction to say that a total disability caused by injuries of a permanent nature is a temporary total disability and for the purpose of defeating plaintiff's rights not a permanent and total disability? Is it a liberal construction to hold that a term which expressly stipulated its protection should commence with a permanent and total disability should afford protection only when all hopes of ever being able to follow a gainful occupation must be abandoned as a certainty? Is it a liberal construction

for the Court to hold that plaintiff's contract of insurance was not an "out and out" contract, and that previous adjudications of the term are not controlling? And finally is it a liberal construction for the Court to adopt a definition of the term which has in all previous adjudications been rejected as not within a reasonable contemplation of the term; and as restrictive of the contract?

In the cases previously cited it was again and again urged upon the Court that the term permanent total disability should be literally construed and if the insurance claimant might sometimes follow another occupation not then available to him he could not recover, but in each instance this contention was rejected as inconsistent with contractual principles and with the contemplation of the parties. But in sanctioning the Bureau's definition defining the conditions under which insurance was to be paid, the Circuit Court of Appeals adopts the contention in all previous instances rejected as repulsive to substantial justice. That the Bureau's definition has this effect is not only shown by an analysis of the definition but is authenticated by plaintiff's rating of temporary total disability.

The Circuit Court of Appeals then cites Joyce on Insurance, section 3032, and Tent *vs.* King, 79 Ill. Appeals 145 as authorities for the Bureau's definition. Tent *vs.* King is not available to the plaintiff. But citing Joyce on Insurance the authority is as follows:

Sub-Division A:

> "Total and permanent disability to perform and direct any kind of labor or business means that the disability must not only be total but it must also be permanent so far as the ability to perform or direct any kind of labor or business is concerned."

After accepting sub-division (a) from Joyce the Circuit Court of Appeals ignores sub-division (b) which does not give sub-division (a) the literal effect which it must bear to support the Bureau's definition of what constitutes permanent and total disability. But in each instance the application of the rule set forth in sub-division (a) limits the labor or business which the insured must be totally incapacitated from performing to the labor or business which the insured could perform at the time of entering into the contract. The Circuit Court of Appeals cites this authority but refuses to follow the principle of construction while upon authorities cited in the foot note of Joyce on Insurance the District Court follows the principle of construction and applies it to the case before the Court while the Circuit Court of Appeals holds that interpretations given the term in the ordinary business contracts considered in Joyce on Insurance and the authorities thereunder cited are not controlling.

It is submitted that the attitude of the Circuit Court of Appeals in citing the above authorities as supporting the Bureau's definition of the term permanent and total disability and then forthwith holding that the identical authorities are not authorities in determining the effect of the term itself challenges the record of American Jurisprudence. But even though the government could successfully contend that their contract was a mere fraud falsely pretending to insure men against permanent and total disability without in fact entering into a binding obligation to that effect the terms of the statute itself especially stipulates that insurance was to become payable "during the permanent and total disability of the insured." And the term of the full and

exact terms and conditions stipulates that the insurance was to become payable "commencing with a permanent and total disability and continue during such disability," which effects and interpretation adverse to the definition of the Director relied upon as controlling. Ginell *vs.* Prudential Insurance Company, 200 N. Y. Supp. 261.

If Bureau regulation in question is given a fair interpretation in accordance with the principles set forth in Joyce on insurance it would warrant recovery in the case before the Court. Under the evidence and under the Bureau's rating of total disability it would not seem that plaintiff's total disability upon date of discharge could be seriously questioned. The Bureau regulation then states that to be permanent the claimant's total disability must be founded upon conditions which render it reasonably certain that that total disability will continue throughout the life of the person suffering from it. Plaintiff's disabilities upon which his total disability is founded are permanent and certain to continue through life. Under all authorities including those cited by the Circuit Court of Appeals the only occupations which could be considered in adjudicating the contract are those which could be reasonably contemplated and available to the insured. Plaintiff's total disability is clearly founded upon conditions which render it certain that he can never successfully resume any occupation available to him at the time of entering into the contract and it is submitted that plaintiff is within a fair interpretation of the Bureau regulation.

The above view is in fact sanctioned within the regulation for after providing that insurance shall be payable as above the regulation further provides:

"Whenever it has been established that any person to whom any installment of insurance has been paid as provided in Art. IV on the grounds that the insured has become totally and permanently disabled, has recovered the ability to continuously follow a gainful occupation, the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue."

If Treasury regulation above is given full effect a literal interpretation of the first stipulation ("that total disability must be founded upon conditions which render it reasonably certain that total disability will continue throughout the life of the insured") is not consistent with the above provision. For if it must first be certain that the claimant will at all times be totally disabled before any insurance installments are due him, how then could he ever recover the ability to continuously follow a substantially gainful occupation? It is submitted that the only consistency permissible sanctions the conclusion that the regulation only intended to stipulate that the claimant's total disability must be founded upon conditions which render it certain of his total incapacitation to follow any occupation available to him at the time of incurring his disability shall continue throughout life and then should the insured recover a new earning capacity payments would cease. This view again is consistent with the exact terms and conditions of the contract stipulating that insurance is to become payable commencing with a permanent and total disability and continue during such disability. The Circuit Court of Appeals again does not commit itself other than to say the Director had the broad power to determine the conditions under which insurance payments

were to be made or denied but the reversal of the judgment below signifies that the Circuit Court sanctioned the contention that the first provisions of the regulation were to be literally construed even though inconsistent with the exact terms and conditions of the contract and with the modifying provision of the regulation as well as contrary to the authorities cited by the Circuit Court of Appeals as sustaining their view.

In passing upon the regulation the U. S. District Court in Jagodinigg *vs.* U. S. holds:

> "The War Risk Bureau defines total disability as follows:
>
> " 'Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed in Art. III and IV to be total disability.'
>
> "This certainly does not mean that the requirement to follow any substantially gainful occupation shall be satisfied by the performance of some negligible duties under the supervision and direction of a guardian caretaker. What is meant is clearly the ability of the soldier to earn substantially through independent efforts." Jagodinigg *vs.* United States, 295 Fed. 918.

The Circuit Court of Appeals then expresses the opinion that the Director of the Bureau had the right to ascertain the conditions under which insurance payments were to be made or denied.

But from what source is this power delegated? It is elementary that the conditions under which insurance payments were to be made were set out in the contract and it is submitted that the Director was delegated only the duty of ascertaining whether or not the conditions of the contract existed, and upon authority of this Court, his finding was not final, to either law or facts. United States

of America *vs.* S. A. Pfitsch, 254 U. S. 548-50, 65 L. Ed. 1086-7.

Upon the foregoing authority it is submitted that the Director has no arbitrary power to determine the conditions under which insurance payments were to be made. Should such a power be claimed what would be left for the Court to exercise jurisdiction over? The power of determining the conditions under which insurance payments are to be made goes to the right of the plaintiff and if the Director has the power to stipulate the conditions of insurance payments he can arbitrarily defeat any claim by simply deciding upon new and different conditions of payment.

Let us first examine the law under which this unusual delegation of power is claimed.

First the powers of the Director are expressed giving him power of first instance to administer, execute, and enforce the provisions of this act, and for that purpose to issue rules and regulations not inconsistent with the provisions of the act. Statute 40 399-555 U. S. Cer. p. Stat. 1916-1919 Supp. 514KK

Then the Director was given the power to determine upon and publish the full and exact terms and conditions of the contract of insurance and to issue regulations for the advantage and benefit of the beneficiaries. (40 Stat. 409-615) U. S. Compiled Statute, 1916, 1919 Supp. 514.

The regulation herein is not contended to be a part of the exact terms and conditions of the contract, and could not be contended to be for the benefit of the insured. The Director then had power to administer the act and for the purpose of administration to adopt regulations not inconsistent with the act. It is submitted that the fore-

going regulation when literally construed and given the effect of specifying the only conditions under which insurance is to become payable is inconsistent with the act of Congress specifying that insurnace is to become payable during the permanent and total disability of the insured. For how could insurance become payable during a permanent and total disability and yet not become payable commencing with the disability and continue during such disability and become payable only when total disability is founded upon conditions which render it certain total disability will continue throughout life? If a man is totally disabled and his disability permanent, is he not permanently and totally disabled within the express wording of the statute that insurance is to become payable "during permanent and total disability"?

The Circuit Court of Appeals in effect admits this inconsistency when it justifies its holding upon the grounds that Congress had broadly given the Director the power of ascertaining the condition under which payments of insurance should be made or denied. The opinion of the Circuit Court of Appeals in no manner restricts this power even though inconsistent with the delegation of Congress and would go to the extent of upholding a decision of the Director specifying that insurance was to become payable only when it became certain that the insured was upon his death bed, and this would be true even though the insured had in fact been permanently and totally disabled for many preceding years. The regulation of the Director does not fall far short of this stipulation, but it is submitted that no such power can be delegated by Congress to any ad-

ministrative official within the Constitution of the United States.

All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives, Sec. 1, Art. 1, U. S. Constitution.

Quoting from Williamson *vs.* U. S., 207 U. S. 462:

> "True it is that in the concluding portion of Sec. Three (3) of the timber and stone act it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred." Williamson *vs.* U. S., 52 L. Ed. 297; Baltimore S. O. R. Co. *vs.* Lumbert Run Coal Co., 267 Fed. 780.

Even though there were ambiguity in the statute the Director could not take away rights conferred by statute.

Quoting from U. S. *vs.* United Verde Copper Co.:

196 U. S. 215.

> "But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. * * * * * If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has intrusted to the Secretary the power to regulate the exercise of the license, not to take it away. There is, undoubtedly,

ambiguity in the word expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them, or invest the Secretary of the Interior with the power of legislation. The words of the statute are that the felling and use of timber by the industries designated shall be 'subject to such rules and regulation as the secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, *and for other purposes.*' The ambiguity arises from the words which we have italicized. They express a purpose different from the protection of the timber and undergrowth, but they cannot, we repeat, be extended to grant power to take from the industries designated, whether by the general clause or the specific enumeration, the permission given by Congress." Baltimore S. O. R. Co. *vs.* Coal Co., 267 Fed. 780; Commercial Solust Corporation *vs.* Mellon, 277 Fed. 551; C. A. Weed S. Co. *vs.* Lockwood, 266 Fed. 792; Burk Waggoner Oil Ass'n. *vs.* Hoppins, 296 Fed. 299.

Quoting from Morrill *vs.* Jones, 106 U. S. 466:

"The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation." Int. Ry. Co. *vs.* Davidson, 257

U. S. 514, 66 L. Ed. 245; Greenport Basin Const. Co. *vs.* U. S., 269 Fed. 60; Mellon *vs.* Minn. S. R. S. SS Ry. Co., 285 Fed. 981; Burk Waggoner Oil Co. *vs.* Hoppins, 296 Fed. 499.

In U. S. *vs.* Lee, 106 U. S. 196, Justice Miller said:

> "The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. * * * * * No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

The amendment to Art. III, providing statutory benefits to be paid to men who had received certain disabilities, deemed by Congress to be permanent and total disabilities was intended only as beneficial legislation applicable to only Sec. III of the War Risk Insurance Act, and was subsequent to the contract herein, and to the disabilities incurred thereunder, and could not effect plaintiff's right.

The view of the Circuit Court of Appeals is again very indefinite. Early in the opinion it is said:

> "The certificate of insurance issued by the United States under the War Risk Insurance Act and the acts supplemental thereto, entitled him to insurance in the sum of $10,000, 'payable in case of death or total

permanent disability in monthly installments of $57.50.' The certificate was made subject to the payment of premiums required and was issued under the authority of the act amending an act entitled an Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department, approved September 2, 1914, and for other purposes, approved October 6, 1917 (40 Stat. 298) and subject in all respects to the provisions of such act 'and any amendments thereto and to all regulations thereunder now in force or hereafter adopted,' all of which, together with the application for the insurance and the terms and conditions published under authority of the act, should constitute the contract."

It appears from the foregoing that the Circuit Court of Appeals considered the certificate as plaintiff's contract of insurance. This it is submitted is an obvious fallacy. The certificate was not issued until after the contract herein was undertaken and is only evidence that plaintiff was insured under statutory authority, and according to the exact terms and conditions of the contract.

The certificate makes the contract subject to amendments by statute. This proviso it is submitted is entirely inconsistent with a contract, and if given effect at all must be interpreted not to authorize the right to destroy the rights purchased in the original contract. Congress in Art. IV of the War Risk Insurance Act specifies certain terms of the contract among which are: "The Insurance shall be payable * * * * * during the permanent and total disability of the insured."

The attention of the Court is called to the statutory provisions authorizing payment under Sec. 401 of Art. IV of the War Risk Insurance Act. This section in addition to authorizing the Director of the War Risk Insurance Act

also provides an automatic insurance to become payable in event of death or permanent and total disability. This portion of the section grants a purely statutory right and limits the protection to 120 days after the publication of the full and exact terms and conditions of the contract. 40 Stat. 409-614; U. S. Comp. Stat. 514 u. u. Which special provision was amended by Act of June 25, 1918. Since this was a right conferred by purely statutory enactment without consideration it is clear that Congress could in its discretion abridge, or retract this right. But even under the foregoing circumstances Congress showed no intent to abridge the statutory promise made even without consideration by providing:

> "Provided that nothing herein shall be construed to interfere with the payment of monthly installments, authorized to be made under the provisions of said section Four Hundred and One (401) as originally enacted for the month up to and including June, Nineteen Hundred and Eighteen." 40 Stat. 615—U. S. Comp. Stat. 514 u. u.

Whether the promise was statutory or for a consideration Congress in 1918 was careful to safeguard promises against restrictions, and so far as the contract of insurance herein made no alteration in the statute.

For the purpose of clearness it is again stated that the statutory right referred to alone is no part of this contract. But was merely a promise of similar benefits which were limited to One Hundred and Twenty days duration at the expiration of that time men of military service would not longer be within the automatic insurance clause but could avail themselves of the government offer to insure them for a consideration. In the case before the

Court the right conferred by statutory promise had been exhausted and on or about February first, nineteen hundred and eighteen, plaintiff accepted the government offer and thereafter made payments accordingly. This is the contract before the Court.

By Sec. 514 u. u. Congress extended the time for making application for insurance, and provides especially that the automatic insurance shall not be extended.

Sec. 514 u. u. u. sets forth the terms of the contract of insurance specifying that insurance shall become payable during the permanent and total disability of the insured, and authorizes the Director to make regulations for the alternative benefits of the insured and beneficiaries, but does not state that the Insurance Contract may be made subject to amendments by Congress.

It is again submitted that an amendment of the terms could not be permitted in an undertaking of this kind. The terms must be specified in the original undertaking otherwise there could be no contract. This is elementary law, but the Director of the Bureau in issuing the Certificate of Insurance specifies that the contract is subject to such amendments as Congress may enact. The very nature of the Director's stipulation is flagrantly inconsistent with a contractual obligation which Congress had authorized.

The Director has no authority to impose additional provisions. In Williamson *vs.* U. S. administrative officials had required an affidavit that entryman had not sold any interest in land prior to insurance of final certificate.

> "But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract as was found to exist by the Supreme Court of Oregon would

vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law. Myers *vs.* Croft, 13 Wall. 291, 20 L. Ed. 562." Williamson *vs.* U. S. 207 U. S. 461, 52 L. Ed. 296. Morril *vs.* Jones, 106 U. S. 466; previously quoted.

In the foregoing opinion, the administrative stipulation not authorized by the law was held to be of no effect and again the stipulation is on abridgment of the right authorized by statute and is legislation of the Director, legislating that the contract is subject to Congressional Amendments. Abridgments of statutes are void. U. S. *vs.* Copper Company, 196 U. S. 215, quoted *supra.*

From the statute of Art. IV it is clear that Congress intended to enter into a binding obligation to insure men in military service against permanent and total disability according to general terms specified. The Director's stipulation that the insurance contract is to be made subject to unqualified amendments is therefore inconsistent with the law of Congress and within the restrictions expressly imposed upon the Director. 40 Stat. 399, 555 U. S. Comp. Stat. 514 ¼. 1919 Supp.

If the unqualified right to amend the terms of the contract is sanctioned the contract does not become payable

during the permanent and total disability of the insured but becomes payable only under such conditions as Congress may subsequently provide. This clearly is inconsistent with the stipulation of Congress providing insurance shall become payable during the permanent and total disability of the insured and for this reason again beyond the power of the Director.

An amendment to the War Risk Insurance Act, however, is permissible in authorizing future insurance contracts for Congress was providing only for yearly renewable term insurance, U. S. Comp. Statute, 1916-1919, Supp. 514 vv. 40 Stat. 410.

Congress could then amend the statute which would become effective at the expiration of the year, without altering the contracts under the original act and the new yearly renewable term insurance would be subject to the new terms imposed at the expiration of each term.

It is submitted that since no amendments are expressly authorized the Director's specification that the contract is subject to amendments will be presumed to apply only to the foregoing circumstances under which amendments would be permissible but that since the original contract herein had not expired prior to plaintiff's disability, and Congress did not by any implications restrict or define the term permanent and total disability while the contract herein was in force the Director's specification that the contract is subject to amendment has no application to plaintiff's claim.

The amendment relied upon by the defendants has no express applicability to Art. IV of the contract of insurance, but was provided as an amendment to the compensa-

tion section, Art. 3 of the War Risk Insurance Act. Under the opinion of the Circuit Court of Appeals holding that permanent and total disability under the contract of insurance could not be interpreted in conflict with the subsequent statutory amendment to the compensation proviso a review of this beneficial measure becomes material.

Art. 3 of the original compensation provision provided as follows:

> (1) If and while the disability is total, the monthly compensation shall be the following amounts:
>
> "(a) If the disabled person has neither wife nor child living, $30.00.
>
> "(h) If he is totally disabled and in addition so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding $20.00 per month, as the Director may deem reasonable: Provided, however, that for the loss of both feet or both hands or both eyes, or for becoming totally blind or becoming helpless and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month: Provided, further, that where the rate of compensation is $100 per month, no allowance shall be made for a nurse or attendant."

U. S. Comp. 1916, Annotated 1919 Supplement, 514r, page 45.

> "'A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the Bureau. Ratings may be as high as 100 per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of a permanent injury. The Bureau in adopting the schedule of ratings of reduction in earning capacity shall consider the impairment in

ability to secure employment which results from such injuries. The Bureau shall from time to time readjust this schedule of ratings in accordance with actual experience.' " (U. S. Comp. Stat, 1916-1919 Supp. 514r.)

The Act of June 6th, 1924, provided an amendment, the foregoing to read that:

"The raitng shall be based as far as practicable upon the average impairment of earning capacity resulting from such injuries in earning capacity resulting in civil occupations similar to the occupation of the injured man at the time of enlistment." Sub. Div. 4 Sec. 202, Title II.

The term "total disability" as used in the War Risk Insurance Act is then "total inability to earn a livelihood," which disability under the originals entitled the claimant to $30.00 a month compensation and partial disability is to be paid in accordance to the loss in earning capacity. This is the total disability which was before Congress in the Compensation section.

In connection with the interpretation of the insurance contract the attention of the Court is called to the fact that Congress expressly refers to Article III designating certain disabilities, among which are total disability, the thirty dollar man—totally disabled and in addition so helpless as to require an attendant, the fifty dollar man, and the man indicated as helpless or permanently bedridden, the hundred dollar man. Had it been the intention of the Congressional body to indicate a man helpless or permanently bedridden as the man entitled to benefits under the insurance policy would they not have designated him in terms equally as clear, or had they intended that the man coming under the contract should be so helpless as to be in needs of an attendant would they not have so stipulated in their statu-

tory provision? Both terms had been before Congress together with the term total disability which is clearly shown in Article III to mean total inability to earn a livelihood.

The terms designating the hundred dollar disability were not deemed descriptive of the man contemplated in the insurance contract. Except as qualified to limit the liability under the contract to disabilities of a permanent nature, total disability is the term drafted into the insurance contract. Congress already had the image of a man totally disabled from earning a livelihood before them, and provided that the claimant must be permanently as well as totally disabled. This is the literal meaning of permanent and total disability interpreted in the light of statutes upon which it is dependent for its explanatory provisions, and the only literal interpretation which will carry out the obvious purpose of the insurance contract. To sanction an interpretation which limits disability term to an invalid's protection is to carry its provision within the realm of the rejected terms and to ignore the manifest purpose of the act.

The amendment relied upon by the defendants is as follows:

> "If and while the disability is rated as total temporary, the monthly compensation shall be the following amounts:
>
> "(a) If the disabled person has neither wife nor child, $80.00.
>
> "(b) If and while the disability is rated as total and permanent the rate of compensation shall be $100 per month; Provided, however, that the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or becoming helpless and permanently bedridden shall be deemed to be total permanent dis-

ability: Provided further, that for double total, permanent disability the rate of compensation shall be $200 a month."

Sub Div. 3, U. S. Comp. Stat. 1916-1923 Supp. 514.

What justification is there for the conclusion that the foregoing amendment was a Congressional repudiation of the terms contracted under the War Risk Insurance Contract. Congress still provided compensation in the amount of $80 for a total occupational disability and then especially provided that injuries of a permanent nature should be given a permanent rating.

Sub Div. 4, 514R1916 Comp. Stat. 1923 Supp. then expressly provides a permanent and total disability rating exclusive of the permanent and total disability designated above. When considered in their true light these two provisions for a permanent and total disability are neither inconsistent nor in conflict. Under the original proviso compensation is to be paid for an industrial permanent and total disability, which proviso has been carried over into all subsequent amendments. Permanent and total industrial disabilities would not necessarily be caused by disabilities named in the Sub. Div. 3 of the statute so by this section Congress legislated an exception to the general theory of the act and provided that certain disabilities even though not so in fact would be deemed permanent and total disability, and to accomplish this purpose legislated a permanent and total disability for the purpose of $100 compensation basis. Congress, in fact, still retains its industrial permanent and total disability in the same statute relied upon in accordance with the original theory of the act, and did not enact that the specific disabilities set forth would be considered permanent and total disability to the

exclusion of all other disabilities so if this statute has applicability it is submitted that it can in no way be implied that the permanent and total disability set forth in the insurance contract was intended to be limited to the disabilities set forth in the statute relied upon but to the contrary the same theory applied to the contract of insurance would still authorize the original permanent and total disability according to the government undertaking, and in instances where the specific injuries were not a permanent and total disability would deem that a permanent and total disability existed even though the claimant could still follow his profession, or occupation with reasonable success.

In fact the opinion of the Circuit Court of Appeals admits this construction by first holding:

Opinion of the Court.

> "Total permanent disability must exist in order to make the greater protection available. Whether such a condition exists must depend upon facts in the concrete case presented by the insured. It would be practically impossible to lay down a hard and fast rule; indeed, obviously it might be unjust to attempt to do so. Common knowledge tells us that in one person, as, for instance, in a frail, delicate body, a condition of total permanent disability may exist as the direct result of certain physical conditions, while in a vigorous, strong body almost exactly similar conditions might produce but partial and temporary disability."

And then by express language later holding:

> "Nor can any (interpretation) be upheld if in conflict with the declaration in the Amendment of Dec. 24, 1919. (41 Stat. 373-374.)"

The Circuit Court first expressly holds that no definite criterion of disability is fixed by the statute and that none can be adopted and then specifically states that no inter-

pretation can be upheld if in conflict with the statute above cited. Statute (41 373-4) clearly specifies a definite criterion for permanent and total disability legislated. That the loss of arms, etc., is definite could not be disputed and that helpless and permanently bedridden is definite regardless to previous physical status and occupational ability is almost equally clear. The only consistency which your plaintiff can derive from the two holdings is that the Bureau could not refuse insurance payments to the man who was within the specific disabilities of the compensation statute (even though these disabilities in his particular case did not actually totally incapacitate him from following an available occupation) without conflicting with the statute deeming the specified disabilities to be permanent and total. Should such an instance come before the Court this would be a liberal construction, but here the Court in rendering its opinion does not commit itself and makes their decision in a spirit of restricting all disabilities to the statute deeming certain disabilities permanent and total for $100 a month compensation purposes, and this even though their opinions expressly states that the statute sets forth no criterion, and that it would be unjust to attempt to define the term.

Finally it is submitted that the terms of Art. IV have no applicability to the insurance contract in question. The nature of the two undertakings are entirely different. Under Art. III Congress provided only a statutory right. Under Art. IV Congress authorized the government to enter into a contract for consideration. Definitions of the terms under the compensation provision could not be subsequently

made without impairing rights vested under the terms of the contract.

Congress in no manner implies that the subsequent amendment deeming certain disabilities permanent and total disability for the purpose of drawing $100 compensation shall be applied to Art. IV of the War Risk Insurance Act and expressly limits this measure to the $100 a month compensation award, even under the compensation provision. Such failure to designate in applicable terms is deemed to imply an inapplicability. U. S. *vs.* Pfitsch, 254 U. S. 548, 550-65 L. Ed. 1086-87.

Doubtful expressions in a government's dealing with a helpless people are liberally construed in favor of the weak, and strictly construed against the government.

In Choute *vs.* Trapp, 224 U. S. 675, 56 L. Ed. 946, the government had made land grants to Indians under the contract that land should be exempted from taxation. It was contended that tax exemptions should be strictly construed. This Court in that case held:

> "But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are resolved in favor of a weak and defenseless people, who are wards of the nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

In the case before the bar men of military service were in a civil sense weak and helpless and entirely dependent upon the good faith of the government. In a true sense they were wards of the nation, and should they be disabled

within the terms of the War Risk Insurance contract would be even more helpless and dependent upon the good faith of the nation than the American Indian.

Yet by applying the statute to the insurance contract this statute is given a restrictive interpretation and strictly construed against wards of a nation who had ventured to rely upon the government's good faith.

Restrictive terms of the compensation provisions are not applicable to the War Risk Insurance contract.

Under Compensation Sec. Art. 3 it was provided that compensation should be payable for disabilities traceable to the service. It was contended by the government that disabilities under the contract of insurance, Art. IV of the War Risk Insurance Act must also be limited to the service but even though this provision was in force, at the time of entering into the War Risk Insurance contract this provision was held in Jagodding *vs.* United States, 295 Fed. 916 not to restrict to rights under the insurance contract to only disabilities traceable to the service:

> "No person shall be deprived of life, liberty or property without due process of law." Art. V, U. S. Constitution.
>
> "There is a broad distinction between the power to abrogate a statute and the authority to destroy rights acquired under such law." Reichort *vs.* Pelps, 6 Wall 160, 18 L. Ed. 849; Choate *vs.* Trapp, 224 U. S. 671, 51 L. Ed. 671.

In the case of Choate *vs.* U. S. *supra,* Congress had entered into a contract with Indians under statutes exempting land from taxation. It was contended that a subsequent act of Congress destroyed this exemption. In that case it was held:

"The case here is much stronger. For the tax exemption, which adds value to the property, is not perpetual, but is attached to the land only so long as the Indian retains the title, and in no event to exceed twenty-one years. It is property, and entitled to protection as such, unless the fact that the owner is an Indian, subject to restrictions as to alienation, made a difference."

"But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the 5th Amendment.

"The Constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be abrogated by statute. Choate *vs.* Strapp, 224 U. S. 678-956 L. Ed. 946."

In the present case the Court is dealing with a right of a similar nature. Congress had entered into a contract to make certain payments, from a certain fund created through virtue of the War Risk Insurance Act. It is submitted that plaintiff's rights attached to the contract and to the government fund created by virtue of it, and this right became immune from legislation.

Vested rights previously recognized under the War Risk Insurance Act.

Owing to a provision in the War Risk Insurance Act limiting the beneficiaries who can be designated a line of authorities have been adjudicated holding that a named beneficiary have no vested right to unaccrued payments of insurance. This holding is in accordance with the contract for heirs of the named beneficiaries may not be within the

permitted class so upon the death of the named beneficiary the unaccrued payments are held to be vested in the estate of the insured.

Cassellero *vs.* U. S., 271 Fed. 486, Offron 279 Fed. 396; Horst *vs.* U. S., 283 Fed. 600; Gifford *vs.* U. S., 289 Fed. 833; White *vs.* U. S., 299 Fed. 855.

The case of Helmholtz *vs.* Horst was an instance where the insured had named his aunt as beneficiary under existing laws the aunt was not within the permitted class. Subsequent laws validated the aunt as the designated beneficiary. In that case it was held that the only contract which the insured had made with the government designated the aunt as beneficiary, and that subseuent legislation curing the defect did not disturb vested rights, but the Court held:

> "It is evident, therefore, that the beneficiary named by the insured or designated by law took no vested interest in the insurance other than to accrued payments during the time the beneficiary was entitled to receive the same and that further installments would not pass by law of descent and distribution to the heirs of the beneficiary, nor could the beneficiary devise the same by will. Cassellero *vs.* U. S. D. C. 271 Fed. 486. Affm. C. C. A. 279 Fed. 396."

While it is clear no vested rights could accrue to the estate of the beneficiary for the resaon that the contract restricts those who may take under the contract it is submitted that the above decisions recognize a vested right in the estate of the insured and that such rights would vest with equal certainty in the insured himself upon his permanent and total disability.

The judgment entered herein was not reviewable on Writ of Error. Assignments of Error (44-45).

This cause was tried before the Court below without a jury. (Trans., p. 47.) But was a common law action to be heard by a jury. U. S. *vs.* Pfitsch, 256 U. S. 547. And in the absence of a written waiver of jury procedure in the District Court was not authorized by law. Under the above circumstances the District Court becomes an arbitrator of both law and facts and the appellant Court could review only questions of law arising upon the process, pleading, or judgment.

Sec. 566 Rev. Stat. 6 Fed. Stat. anno. 121 Comp. Stat. 1583 provides:

> "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

This rule of the common law was modified by Congress by Section 649, Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.) 130, Comp. Stat. 1587) and Section 700 Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.) 205, Comp. Stat. 1668), which sections pertained exclusively to Circuit Courts. With the abolition of Circuit Courts, these sections were made applicable to District Courts. Ladd & Tilton Bank *vs.* Louis A. Hicks Co., 218 Fed. 310 (C. C. A. 9th Cir.)

It has been uniformly and consistently held by United States Courts that unless a jury trial is waived in the manner provided by Section 649, Rev. Stat., that the District Court trying a cause without a jury sits as an arbitrator and not as a judicial body and that Appellate Courts are limited in their reviews to questions of law arising upon the process, pleadings and judgment.

Bond *vs.* Dustin, 112 U. S. 605, 28 L. Ed. 835, 5 Sup. Ct. Rep. 296;

Campbell *vs.* Boyreau, 21 How. 223, 16 L. Ed. 96;

Rogers *vs.* United States, 141 U. S. 548, 35 L. Ed. 853, 12 Sup. Ct. Rep. 91;

Campbell *vs.* United States, 224 U. S. 99, 56 L. Ed. 684, 32 Sup. Ct. Rep. 398;

Commissioners of Road Improvement District No. 2 *vs.* St. Louis R. Co., 257 U. S. 547, 562, 66 L. Ed. 364, 42 Sup. Ct. Rep. 250;

Rush *vs.* Newman, 58 Fed. 158, 160, 7 C. C. A. 136.

In an action on a contract of insurance subsequently before the Circuit Court of Appeals under like circumstances the Circuit Court held themselves without jurisdiction to review the case. U. S. *vs.* McGovern.

The above cases all establish the rule of law to be that where no written waiver of a jury trial was made or filed as required by section 649 Rev. Stat. no question as to the admission or rejection of testimony or upon any other question of law growing out of the evidence can be considered by the Appellate Court. In order to merit consideration by the Appellate Court of questions allowed by section 700, Rev. Stat., a strict compliance with the provisions of section 649, Rev. Stat., is necessary.

The sufficiency of the finding of facts by the Court to support the judgment cannot be reviewed under such circumstances.

Campbell *vs.* United States, 224 U. S. 99, 56 L. Ed. 684, 32 Sup. Ct. Rep. 398.

The fact that the United States is a party litigant does not in any manner effect this rule.

United States *vs.* National City Bank of New York, 281 Fed. 754 (C. C. A. 2nd Cir.)

Except in cases where the statute of limitations or laches is involved in a suit of a purely governmental matter, when the United States appears as a suitor, it fundamentally submits to the law and places itself on the same footing as other litigants and is not entitled to remedies which cannot be granted to any individual.

Shooters Island Shipyard Co. *vs.* Standard Ship Building Co., 293 Fed. 707 (C. C. A. 2nd Cir.)

The case of United States *vs.* National City Bank of New York is of particular interest here because of the fact that it arose under section 10 of the Lever Act; because the government contended that no jury trial was allowable; and because it deals with consequences resultant upon the failure of the United States as a party litigant to waive a jury trial in proper manner. The Court there first determined that a trial by jury was proper, citing the case of United States *vs.* Pfitsch, *supra.* The Court then stated:

> "When a case is tried in a Federal Court without a jury and without a written stipulation waiving a jury trial, certain important consequences follow. The statutes of the United States provide that the trial of issues of fact in the District Courts in all causes except in equity, and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. Rev. Stat. Sec. 566 (Comp. St. Sec. 1583)."

The Court then set out sections 649 and 700 of Rev. Stat. and continued:

> "It appears from what has already been said that at the opening of the trial of this case, when counsel for the Bank stated that he would waive the right to a jury trial, the Court at once suggested: 'Then you

will have to have a signed stipulation that this may be tried without a jury.'

"Counsel for the government did not seem to grasp the significance of the suggestion. At any rate, while he insisted that the matter should be tried without a jury, he claimed no waiver was necessary, and the case went to trial without a jury and without a written stipulation waiving the jury. The result is that no question is now open to review in this Court on the writ of error, except it be one arising upon the process, pleadings or judgment."

Upon the above authorities:

It is respectfully submitted that the Circuit Court was without jurisdiction to review questions of law and facts arising from the judgment below, and without jurisdiction to reverse the judgment entry in this cause.

Since the reversal of the judgment below is submitted to be without jurisdiction and since it manifestly appears that the decision of the Circuit Court of Appeals disregarded the merits of plaintiff's case and all fundamental principles of law involved as well as the Constitution of the United States it is submitted that their reversal without such consideration should be voided, and the judgment of the District Courts reinstated upon the merits of the government undertaking, and the law involved.

Respectfully submitted,

DEWITT LAW,

Plaintiff in Person.

De Witt T. Law

In the Supreme Court of the United States.

OCTOBER TERM, 1924

DEWITT T. LAW, PLAINTIFF IN ERROR
v.
THE UNITED STATES

No. 550

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ARGUMENT

I

Plaintiff in error not entitled to rating of total permanent disability under his war risk insurance contract

The sole question here involved is whether plaintiff in error is so suffering from total permanent disability as to entitle him to the payments prescribed in the insurance policy issued to him under the so-called War Risk Insurance Act. It appears to be his contention, in substance, that he was insured as a "common laborer" and as his injuries render it impossible, so he claims, to now follow that vocation, he is therefore entitled to be rated as one suffering from "permanent total disability." The trial court seems to have taken the

view that he is so entitled, and in reaching its conclusion to have disregarded those facts and the history of the man which should constitute material elements in determining "permanent total disability." The court also held invalid the definition of "permanent total disability" contained in the regulation of the Director dated March 9, 1918. (R. pp. 73, 74, and 85.) The Circuit Court of Appeals, however, entertained a different view, and concluded plaintiff in error is not entitled to recover. (R. p. 82 et seq.) Its opinion requires little, if any, elaboration. The facts which forbid making the former occupation of plaintiff in error the dominant ground for a "permanent total disability" rating are thus succinctly stated by the appellate court (R. p. 83):

> Before enlistment Law had worked on a farm and at the time of enlistment his education was less than first year high school. In the winter of 1916–1917 he was in school and continued his studies until the month of April, 1917. He had taken a five months' course, consisting of several months of bookkeeping and stenography, and after discharge from the Army he completed his course in bookkeeping at the Normal School in Kansas. He has taken vocational training under the auspices of the Government in the law school in the University of Montana, where he has been in attendance from (fol. 165) September 27, 1919, to the date of the trial of the present case during which time

> he has been allowed by the Government $80 each month from September 27, 1919, to June 1, 1920, and $100 per month from June 1, 1920, to the date of trial. He appeared in his own behalf in the prosecution of this action in the District Court and before the Court of Appeals.

Plaintiff in error seeks to assimilate his case to those arising under ordinary accident and health insurance contracts which have found their way into the courts. He cites such cases in his brief at pages 33 et seq. His contention in this respect must fail, for at least two reasons, viz:

1. War risk insurance contracts are not identical with, and therefore subject to the same rules of construction as, such ordinary insurance contracts, but as so well stated in *White* v. *United States,* 299 Fed. 855, 857:

> The policy of insurance sued on, however, is not the ordinary form used by insurance companies generally. It is a contract made pursuant to the provisions of a Federal statute, and must be construed with reference to such statute. The primary purpose of the act was to afford protection to the soldier and his dependents, and the premiums charged constitute a comparatively small part of the expense involved. As was stated by Senator Williams, in charge of the bill, in the Senate, it was not the purpose of the Government to go into the insurance business, but rather to afford protection not

otherwise obtainable to the soldiers and their dependents (55 Cong. Rec. p. 7690), or, as was said by Comptroller Warwick:

"It is not an out-and-out contract of insurance on an ordinary business basis; neither is it a pension, but it partakes of the nature of both." Op. to Sec'y Treas., July 5, 1919.

The application for insurance is not subject to rejection, or acceptance, at the discretion of the Government, but the right, if exercised within the prescribed time, requires the issuance of the insurance in accordance with the application. It is nonassignable, is not subject to the claims of creditors, and the rights under it may be terminated by certain designated unlawful conduct on the part of a soldier's widow. The application, which is made a part of the contract, in itself provides that the insurance is granted under authority of the act of Congress, and subject to all the provisions of the act and to any amendments thereto, and to all regulations thereunder, now in force or which may thereafter be adopted.

(2) The extent to which the contract was subject to existing and future laws made in relation thereto, as well as to the regulations then existing and thereafter made, is very fully and ably discussed by Judge Donahue, speaking for the Circuit Court of Appeals, Sixth Circuit, in the case of *Helmholz et al.* v. *Horst et al.*, 294 Fed. 417.

The character of these war risk insurance contracts is thus further elucidated in *Helmholz* v. *Horst,* 294 Fed. 417, 420:

> In order to insure the accomplishment of the beneficial purposes of the War Risk Insurance Act, it was further provided therein that the terms and provisions of such contracts of insurance should be subject in all respects to the provisions of the act or any amendments thereto, and also subject to all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for insurance and the terms and conditions published under authority of the act, should constitute the contract. All of these provisions and conditions were written into the certificate issued to Alfred R. Marshall, and became and are a part of the contract. For this reason subsequent amendments of the War Risk Insurance Act and subsequent regulations affecting this contract, which is still in force, do not impair the obligations of an existing contract, but are in direct conformity with its terms, and in furtherance of its purpose and intent.

2. In the cases upon which plaintiff in error relies, the insured was, at the time of injury, engaged in certain manual labor, and nothing appeared to indicate he had any qualifications for other lines of toil, or could then reasonably be expected to acquire such qualifications. The courts properly refused to speculate upon what the insured might through

study or otherwise prepare themselves to do. Such is not the case at bar. The record here not only indicates he had abandoned, when he entered the military service, any purpose to follow in the future the occupation of a farm laborer, but had taken active steps to prepare himself for a more important and remunerative career. (R. pp. 57, 58, and 83.)

The trial court asserts the Government has rated his disability as temporary because through what the Government is doing for him, he "may arrive at the bar." (R. p. 74.) We submit he *has* arrived at the bar, and as cogent proof of this point to the manner in which he has handled his case from its inception including the preparation of briefs. These facts fortify rather than destroy the correctness of the rating of temporary total disability given him by the Bureau, whose decision should not now be lightly overthrown. *Forbes* v. *Welch,* 286 Fed. 765, 767.

The dominant error in the decision of the trial court seems to have been in treating plaintiff in error as a common laborer. He has thoroughly demonstrated a higher business or professional rating. A final criticism of the action of the trial court is to be found in the fact that it rendered judgment not upon the strength of the showing made by plaintiff in error, but upon apparent weakness in the defense showing.

The Circuit Court of Appeals in its well reasoned opinion in the case at bar satisfactorily disposes of the issues involved, and it is respectfully submitted that its judgment should be affirmed.

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DECEMBER, 1924.

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